IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No.

WILMETTE PARK DISTRICT,

Petitioner,

vs.

NIGEL D. CAMPBELL, COLLECTOR OF INTERNAL REVENUE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

INDEX.

In the
United States Circuit Court of Appeals
For the Seventh Circuit

No. 9567

WILMETTE PARK DISTRICT,
Plaintiff-Appellee,

vs.

NIGEL D. CAMPBELL, COLLECTOR OF INTERNAL REVENUE,
Defendant-Appellant.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

INDEX.

TRANSCRIPT OF PROCEEDINGS.

Pleas had at a regular term of the District Court of the United States for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of September (it being the 1st day thereof) in the year of our Lord One Thousand Nine Hundred and Forty-Seven and of the Independence of the United States of America, the 172nd year.

Present:

Honorable John P. Barnes, District Judge
Honorable Philip L. Sullivan, District Judge
Honorable Michael L. Igoe, District Judge
Honorable William J. Campbell, District Judge
Honorable Walter J. LaBuy, District Judge
Honorable Elwyn R. Shaw, District Judge
Honorable William H. Holly, District Judge
Roy H. Johnson, *Clerk.*
Thomas P. O'Donovan, *Marshal.*

Monday, September 29, 1947

Court met pursuant to adjournment

Present: Honorable William J. Campbell, Trial Judge

2 IN THE DISTRICT COURT OF THE UNITED STATES.

For the Northern District of Illinois.

Eastern Division.

Wilmette Park District,
a Municipal corporation,
Plaintiff-Appellee,
vs.
Carter H. Harrison, Collector
of Internal Revenue,
Defendant-Appellant.
} No. 43 C 318

Be It Remembered, that, on to-wit, the 24th day of March, 1943, the above-entitled action was commenced by the filing of the following Complaint, in the office of the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, in words and figures following, to-wit:

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26 And afterwards on, to-wit, the 2nd day of April, 1946 came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Notice And Amended and Supplemental Complaint in words and figures, to-wit:

27 IN THE DISTRICT COURT OF THE UNITED STATES.

For the Northern District of Illinois.

Eastern Division.

Wilmette Park District,
a Municipal Corporation,
Plaintiff

vs.

Nigel D. Campbell,
Collector of Internal Revenue,
Defendant

NOTICE.

To: J. Albert Woll
United States Attorney
for the Northern District of Illinois
United States Courthouse
Chicago, Illinois

Please Take Notice that on the morning of the 2nd day of April at the opening of court, or as soon thereafter as counsel can be heard, we shall appear before the Honorable Judge Campbell in the courtroom usually occupied by him and shall then and there ask leave to file instanter an Amended and Supplemental Complaint, copy of which is served upon you with this notice; at which time and place you may appear if you so see fit.

Henry J. Brandt
Attorney for Wilmette Park District
11 South LaSalle Street
Randolph 0220

Received a copy of the above and foregoing notice, together with a copy of the Amended and Supplemental Complaint, this 1st day of April, 1946.

J. Albert Woll
U. S. Attorney by E. Tillotson

28 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—43 C 318) * *

AMENDED AND SUPPLEMENTAL COMPLAINT.

Wilmette Park District, a municipal corporation, plaintiff, brings this suit against Nigel D. Campbell, Collector of Internal Revenue, to recover the sums of $57.20, erroneously and unlawfully collected from the plaintiff as an Admissions Tax for the year 1941; $3979.43 erroneously and unlawfully collected from the plaintiff as an Admission Tax for the years 1942 to July 1944; $2103.30 erroneously and unlawfully collected from the plaintiff as an Admissions Tax for the year 1945, allegedly under authority of an Act of Congress known as the Admissions Tax Act (53 Stat. 189, as amended, Chap. 10, Title 26, USCA, Sec. 1700).

1. Jurisdiction of this Court is based upon Subdivision 5, Section 24 of the Judicial Code, as amended March 2, 1929, Chap. 488, Sec. 1, 45 Stat. 1475.

2. The defendant or his predecessor in office at all times hereinafter mentioned was and the defendant is the Collector of the United States internal revenue for the First District of Illinois, at Chicago, Illinois.

29 3. Plaintiff is a municipal corporation, organized and existing solely under and by virtue of the statutes of the State of Illinois (Illinois Revised Statutes, 1941 Sec. 256 et seq.) as an arm of the State in the operation of a park district within a territory practically co-terminus with the boundaries of the Village of Wilmette, in Cook County, Illinois.

4. Plaintiff is governed and its affairs are administered by a board of five commissioners, elected by vote of the people residing in the district. Through and by its board of commissioners, chosen by popular election, plaintiff has for many years operated and administered, and still operates and administers, a system of public parks and playgrounds and has, in conjunction therewith, during the summer months conducted a public bathing beach in one of such

parks upon and along the shore of Lake Michigan, in the shoal waters thereof.

5. To defray the expense of the operation of such outdoor bathing beach and in the exercise of the authority and power vested in it by the statutes of the State of Illinois, plaintiff has charged a fee to all persons desiring to make use of such public bathing beach, which fee is designed to cover the costs of policing the premises, maintaining a first aid station, showers and other bathing and sanitary facilities.

6. The fee charged by plaintiff for admission to the bathing beach is designed merely to cover the cost of operation and is not imposed by plaintiff for the purpose or in the expectation of realizing a profit or gain, and during the years 1941 to and including 1945 and in prior years the sums realized from the sale of admission tickets to such bathing beach have been insufficient to fully pay operating costs.

30 7. Plaintiff did not during the years 1941 to and including 1945, for which the admissions were collected, or in prior years collect from the purchasers of admission tickets to its bathing beach moneys over and above the face amount of the tickets, nor did plaintiff charge or collect the admissions tax alleged to have been imposed by the Admissions Tax Act (53 Stat. 189, as amended, Chap. 10, Title 26, USCA. Sec. 1700).

8. The admission tickets sold by plaintiff during the year 1941 and theretofore did not bear any statement or legend that any part of the purchase price represented a tax due the Government of the United States, and no part of the proceeds of the sale was allocated to or set aside by plaintiff for payment of any taxes purportedly due the Government of the United States.

9. On or about July 16, 1942 plaintiff seasonably filed with the defendant its claim for a refund in the sum of $57.20; on or about June 28, 1945 plaintiff filed with the defendant its claim for refund in the sum of $3979.43; on or about December 18, 1945 plaintiff seasonably filed with the defendant its claim for a refund in the sum of $2103.30,

but in each case it received notification from the Commissioner of Internal Revenue that its claim for refund of the tax and penalty assessment paid under protest was denied.

10. All of the acts, rulings and determinations of the defendant and the Commissioner of Internal Revenue were unlawful and void because:

(a) Plaintiff is a municipal or public corporation, created by the State of Illinois and constituted to act as an arm of that State in the performance of its authorized governmental functions. One of plaintiff's statutory powers is that of operating and maintaining bathing beaches for public use. The power of Congress to levy and collect taxes for the Federal Government is defined and limited by the Constitution of the United States and does not include the power to tax the governmental activities of a State or of municipal corporations created by and under the laws of such State; nor can the Congress of the United States impose upon the duly elected commissioners of such an independent governmental body the duty to act as tax collection agencies of the Federal Government;

(b) Since Congress does not have the power to tax a municipal corporation, it does not have the power to assess penalties against a municipal corporation for failure to collect a tax illegally levied;

(c) If the Act of Congress commonly known as the "Admissions Tax Act," as constituted and enforced by defendant, is an attempt by the Federal Government to tax the local governmental activities of the creature of a sovereign state, or if it is an attempt to impose upon the commissioners constituting the governing board of the plaintiff the duty of acting as tax collectors for the Federal Government, in either case it is in contravention of the Constitution of the United States and, therefore, void and of no effect.

Wherefore, plaintiff prays judgment or decree upon the facts and for the principal sum of $6139.93, with interest at 6% per annum from the respective dates of payment until

id, together with its reasonable costs and disbursements, d for such other and further relief in the premises as may just.

Wilmette Park District
By Henry T. Brandt
Its Attorney

ppenhusen, Johnston
ompson & Raymond
Of Counsel
South LaSalle Street
icago 3, Illinois
ndolph 0220

And afterwards on, to-wit, the 20th day of May, 1946 came the Defendant by his attorneys and filed in the erk's office of said Court his certain Answer To Amended nd Supplemental Complaint in words and figures follow-g, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—43 C 318) * *

ANSWER TO AMENDED AND SUPPLEMENTAL COMPLAINT.

For answer to the amended and supplemental complaint ed herein, defendant states as follows:

First Defense.

The complaint does not state a claim on which relief can granted.

Second Defense.

I.

Answering paragraph 2, defendant admits that he was the llector of Internal Revenue for the First District of inois, at Chicago, Illinois, and has been since January 1945; that Carter H. Harrison was collector of Internal

Revenue for the First District of Illinois, at Chicago, Illinois, from August 21, 1933 through December 31, 1944; but denies every other allegation therein.

II.

Answering paragraph 3, defendant admits that plaintiff is organized and existing under the statutes of the State of Illinois embodied in Illinois Revised Statutes, 1941, Sec. 256, *et seq.*, within a territory practically coterminous with the boundaries of the Village of Wilmette, in Cook County, Illinois; but denies every other allegation therein for lack of knowledge or information sufficient to form a belief.

40

III.

Answering paragraphs 4, 5 and 6, defendant admits that during the summer months the plaintiff conducted a bathing beach along the shores of Lake Michigan and that it has charged a fee to all persons desiring to make use of such bathing beach; but denies every other allegation therein for lack of knowledge or information sufficient to form a belief.

IV.

Answering paragraphs 7 and 8, defendant denies the allegations thereof for lack of knowledge or information sufficient to form a belief.

V.

Answering paragraph 9, defendant admits that on July 17, 1942, the plaintiff filed a claim for refund with the United States Collector of Internal Revenue for $57.20; that on June 29, 1945, the plaintiff filed with the defendant a claim for refund of $3,979.43; that said claim for $3,979.43 was denied by the United States Commissioner of Internal Revenue; and that on December 19, 1945, the plaintiff filed a claim for refund with the defendant of $2,103.30; but denies every other allegation therein.

VI.

Defendant denies the allegations of paragraph 10.

Wherefore, defendant prays that he have judgment against the plaintiff for costs and all other proper relief.

J. Albert Woll
J. Albert Woll,
United States Attorney,
Attorney for Defendant.

41 State of Illinois }
County of Cook } ss.

George L. Benas, being first duly sworn on oath deposes and says that he is employed as Clerk in the office of the United States Attorney for the Northern District of Illinois; that on the 20th day of May, A. D. 1946, he placed a copy of the foregoing Answer in a Government franked envelope addressed to the following:

Mr. Henry J. Brandt
Poppenhusen, Johnston, Thompson & Raymond
11 South LaSalle Street
Chicago, Illinois

and that he placed said envelope, so addressed and containing said copy of the foregoing Answer in the mail chute located in the United States Court House, Chicago, Illinois, on said date.

George L. Benas

Subscribed And Sworn to before me this 20th day of May, A. D. 1946.

(Seal) Bernice A. Tallmadge
Notary Public

50 And afterwards on, to-wit, the 4th day of December, 1946 came the Defendant by his attorneys and filed in the Clerk's office of said Court his certain Motion For Judgment in words and figures following, to-wit:

51 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—43 C 318) * *

MOTION FOR JUDGMENT.

The defendant respectfully moves the Court for judgment in favor of the defendant for the reasons that under the pleadings, the evidence and the law:

1. The amount paid to the plaintiff as admission to the plaintiff's beach is subject to the tax imposed by Section 1700 of the Internal Revenue Code.
2. The plaintiff owes the amount of said taxes under the provisions of Section 1718 of the Internal Revenue Code.
3. Sections 1700 and 1718 of the Internal Revenue Code as applied to the plaintiff herein are constitutional.
4. The determination of the Commissioner of Internal Revenue that the plaintiff owed the taxes in question under the provisions of Sections 1700 and 1718 of the Internal Revenue Code is presumptively correct and the plaintiff has failed to rebut that resumption.
5. The taxes in question were legally assessed and lawfully collected.
6. The plaintiff has failed to prove a cause of action
52 against the defendant.
7. The record does not contain any substantial evidence to support findings of fact and conclusions of law and judgment in favor of the plaintiff and against the defendant.
8. The defendant is entitled to judgment dismissing plaintiff's complaint.

J. Albert Woll
J. Albert Woll,
United States Attorney,
Attorney for Defendant.

53 And on the same day, to-wit, the 4th day of December, 1946 came the Parties by their attorneys and filed in the Clerk's office of said Court their certain Stipulation Of Facts Exhibits 1 & 2 attached, in words and figures following, to-wit:

54 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—43 C 318) * *

STIPULATION OF FACTS.

It is hereby stipulated and agreed by and between the undersigned that for the purpose of any hearing on the above-entitled action the statements contained in this stipulation are true. Each party reserves the right to object to any part or all of this stipulation on the grounds of immateriality or irrelevancy, and to offer further evidence not inconsistent with the statements contained herein:

1. The plaintiff is a body politic and corporate, organized in 1908 under the provisions of a statute of the State of Illinois, approved June 24, 1895, entitled "An Act to provide for the Organization of Park Districts and the transfer of submerged lands to those bordering on navigable bodies of water," which act and the amendments thereto found in Illinois Revised Statutes, 1945, c. 105, pars. 256 through 295, are made a part hereof by reference. The plaintiff is administered by a Board of Commissioners under the provisions of the aforesaid Illinois statutes, elected by the people residing in the District. The first Board of Com-
55 missioners was elected at a general election held, in pursuance of the statute, on January 14, 1908, and the declaration of the result of such public election was made by order of the County Court of Cook County, entered January 17, 1908.

2. Carter H. Harrison was Collector of Internal Revenue for the First District of Illinois from August 21, 1933, through December 31, 1944. Nigel D. Campbell was and is Collector of Internal Revenue for the First District of Illinois since January 1, 1945.

3. The Wilmette Park District consists of an area of

approximately 2.8 square miles, located within the incorporated area of the Village of Wilmette in Cook County, Illinois, a village organized and existing under and by virtue of Chapter 24 of the Statutes of the State of Illinois, An Act known as the Revised Cities and Villages Act, which village has a population of approximately 20,000. Included within the District are four park areas aggregating approximately .78 square miles. The largest park area, known as Washington Park, extends along the shore of Lake Michigan for approximately three-fourths of a mile. The land area of Washington Park was acquired partly by a grant from the State of Illinois, partly by purchase and partly by the exercise of the right of eminent domain.

4. For more than twenty-five years, the riparian property of the Wilmette Park District at the north end of Washington Park and in the shoal waters of Lake Michigan adjacent thereto has been used as a bathing beach during the summer months.

5. During the years 1941 through 1944, the plaintiff supplied the following services and facilities for use in
56 conjunction with the bathing beach: a bath house containing clothing lockers, toilets, and wash rooms, an automobile parking area, life saving equipment, flood lighting, drinking fountains, showers, spectator benches, bicycle racks, first aid personnel and supplies.

6. The plaintiff employs the following classes of employees for work in connection with the operation and maintenance of the bathing beach: a beach superintendent, a secretary, beach maintenance labor, life guards, check room and gate check workers, general office workers and policemen.

7. The bathing beach is controlled, maintained and operated solely by the Wilmette Park District, and not by a private individual.

8. The Wilmette Park District makes a charge to all persons for admission to the bathing beach and issues tickets to all persons desiring to use the aforesaid beach, facilities and services, except that for single daily admissions which are 50c for week days and $1.00 for Saturdays, Sundays and holidays no tickets are issued.

9. Exhibit 1 contains specimen copies of tickets issued for each type of admission.

10. The bathing beach facilities are utilized principally by residents of the Wilmette Park District, but its facilities are also utilized by non-residents.

11. Exhibit 2 hereto is a statements of the receipts and expenditures for the beach during the beach seasons 1940 through 1944 and a statement of the liabilities of the beach and the facilities connected thereto at the end of each fiscal year from 1940 through 1944.

57 12. The Wilmette Park District did not, during the year 1941, or in any prior years, collect from purchasers who paid admissions to its bathing beach facilities any amount to cover the admissions tax alleged to have been imposed by the Admissions Tax Act (53 Stat. 189, as amended, c. 10, Title 26, U.S.C.A., sec. 1700).

13. From Gary, Indiana to Lake Bluff, Illinois there are 29 municipally operated bathing beaches, some of which do and some of which do not charge admissions. From South Chicago to Highland Park, Illinois there are 15 Lake Michigan bathing beaches operated by private persons for profit, of which 9 charge admissions and 6 are operated by hotels and clubs for the use of their patrons, residents and members without any express or specific admission charge.

14. On July 24, 1941, the plaintiff received a written notice from the office of the Collector of Internal Revenue for the First District of Illinois directing it to collect an admissions tax of 10% on all bathing beach tickets sold on and after July 25, 1941.

15. In June of 1942, the United States Commissioner of Internal Revenue, hereinafter called the Commissioner, made an assessment against the plaintiff for $57.20 as the amount due from the plaintiff under the provisions of Section 1718 of the Internal Revenue Code with respect to the tax due under Section 1700 of the Internal Revenue Code on the amounts paid as admissions to the bathing beach of the plaintiff from July 25, 1941, to October 1, 1941. This amount was paid on June 20, 1942. A claim for refund of this amount was filed with the Collector of Internal
58 Revenue on July 17, 1942 and was rejected by letter from the Commissioner of Internal Revenue of December 22, 1942.

16. Subsequently, the Commissioner made assessments against the plaintiff aggregating $3,979.43 as the amounts

due from the plaintiff under the provisions of Section 1718 of the Internal Revenue Code with respect to the taxes due under Section 1700 of the Internal Revenue Code on the amounts paid as admissions to the bathing beach of the plaintiff during the years 1942, 1943 and 1944, plus interest on the principal amount of the tax, and the amounts due under Section 3655(b) of the Internal Revenue Code for failure to pay said tax on demand. This aggregate amount was paid on May 15, 1945. A claim for refund of this amount was filed with the defendant on June 29, 1945 and was rejected by letter dated January 11, 1946.

17. Subsequently, the Commissioner made an assessment against the plaintiff of $2,103.30 as the amount due from the plaintiff under the provisions of Section 1718 of the Internal Revenue Code with respect to the taxes under Section 1700 of the Internal Revenue Code on the amount paid as admissions to the bathing beach of the plaintiff during 1945. This amount was paid on November 20, 1945. A claim for refund of this amount was filed with the defendant on December 19, 1945.

Henry J. Brandt
Attorney for Plaintiff
J. Albert Woll
Attorney for Defendant

Poppenhusen, Johnston, Thompson
& Raymond
Of Counsel.

No. B 510 $1.50

INDIVIDUAL TICKET
SEASON 1943

WILMETTE BATHING BEACH

ISSUED TO _____

NON-TRANSFERABLE

FOR BEACH AND BEACH HOUSE PRIVILEGES

TOKEN NO. _____

THE WILMETTE PARK DISTRICT
HENRY FOWLER
PRESIDENT

SEE RULES OVER

No. 2005 $4.00

FAMILY TICKET
SEASON 1943

WILMETTE BATHING BEACH

ISSUED TO _____

AND MEMBERS OF FAMILY

FOR BEACH AND BEACH HOUSE PRIVILEGES

TOKEN NO. _____

THE WILMETTE PARK DISTRICT
HENRY FOWLER
PRESIDENT

SEE RULES OVER

No. D 485 $6.00

FAMILY BATHING AND PARKING TICKET
SEASON 1943

WILMETTE BATHING BEACH

ISSUED TO _____

AND MEMBERS OF FAMILY

FOR BEACH AND BEACH HOUSE PRIVILEGES
AND AUTOMOBILE PARKING SPACE

TOKENS ISSUED
NO. _____
TO _____

THE WILMETTE PARK DISTRICT
HENRY FOWLER
PRESIDENT

SEE RULES OVER

No. B 200 $2.00

INDIVIDUAL TICKET

SEASON 1946

WILMETTE BATHING BEACH

ISSUED TO _____

NON-TRANSFERABLE

FOR BEACH AND BEACH HOUSE PRIVILEGES

TOKEN NO. _____

THE WILMETTE PARK DISTRICT

CARL H. MORGENSTERN

PRESIDENT

SEE RULES OVER

SIGNATURE

No. 2195 $5.00

FAMILY TICKET

SEASON 1946

WILMETTE BATHING BEACH

ISSUED TO _____

AND MEMBERS OF FAMILY

FOR BEACH AND BEACH HOUSE PRIVILEGES

TOKENS ISSUED

NO. _____

TO _____

THE WILMETTE PARK DISTRICT

CARL H. MORGENSTERN

PRESIDENT

SEE RULES OVER

SIGNATURE

No. D 635 $7.50

FAMILY BATHING AND PARKING TICKET

SEASON 1946

WILMETTE BATHING BEACH

ISSUED TO _____

AND MEMBERS OF FAMILY

FOR BEACH AND BEACH HOUSE PRIVILEGES

AND AUTOMOBILE PARKING SPACE

TOKENS ISSUED

NO. _____

TO _____

THE WILMETTE PARK DISTRICT

CARL H. MORGENSTERN

PRESIDENT

SEE RULES OVER

SIGNATURE

EXHIBIT 1

THE WILLAMETTE BATHING BEACH

STATEMENT OF RECEIPTS AND EXPENDITURES

FOR THE YEARS ENDED MARCH 31, 1941 TO 1945, INCLUSIVE

COVERING THE BATHING SEASONS OF 1940-1944, INCLUSIVE

	SEASONS OF					
	1940	1941	1942	1943	1944	Total for Five-Year Period
GROSS RECEIPTS:						
Beach tickets	$6,149.75	$7,080.00	$7,239.25	$ 7,870.50	$ 8,529.25	$36,868.75
Bathing and parking tickets	1,962.00	2,334.00	1,962.00	1,890.00	2,280.00	10,428.00
Incidental beach receipts	140.96	203.63	196.25	242.25	345.53	1,128.62
Total	$8,252.71	$9,617.63	$9,397.50	$10,002.75	$11,154.78	$48,425.37
EXPENDITURES:						
Wages and salaries for life guards, checkers, office, police, maintenance and supervision	$4,980.00	$5,629.95	$6,459.04	$6,515.10	$ 6,962.77	$30,546.86
Miscellaneous out-of-pocket expenses such as postage, materials, tokens, etc.	1,106.02	1,833.28	1,737.80	1,858.13	1,420.05	7,955.28
Sub-total	6,086.02	7,463.23	8,196.84	8,373.23	8,382.82	38,502.14
Special expenditures for construction of additional parking areas, toilets and washrooms	-	5,934.33	261.54	-	3,685.25	9,881.12
Total expenditures	$6,086.02	$13,397.56	$8,458.38	$8,373.23	$12,068.07	$48,383.26
Difference between receipts and expenditures	$2,166.69	$ 3,779.93	$ 939.12	$1,629.52	$ 913.29	$ 42.11

NOTE:
(a) The accounts of the Beach are maintained on a cash receipts and disbursements basis.

STATEMENT OF LIABILITIES AS OF MARCH 31, 1940 TO 1945, INCLUSIVE

LIABILITIES:	1940	1941	1942	1943	1944	1945
Due to Willamette Park District General Fund	$1,160.36	$1,006.33 (a)	$2,773.60	$1,834.48	$ 204.96	$1,118.25

NOTE:
(a) Receivable as of March 31, 1941

EXHIBIT F

61 And afterwards on, to-wit, the 5th day of December, 1946 there was filed in the Clerk's office of said Court a certain Transcript Of Proceedings Had On December 4, 1946, Before Hon. William J. Campbell, District Judge, in words and figures following, to-wit:

62 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—43 C 318) * *

Transcript of proceedings had and evidence taken at the hearing of the above entitled case before the Honorable Wliliam J. Campbell, one of the judges of said court, in his court room, 757 U. S. Court House, Chicago, Illinois, on Wednesday, December 4th, 1946, at 3:00 o'clock P. M.

Present:

Messrs. Poppenhusen, Johnston, Thompson & Raymond, by
Mr. Henry J. Brandt,
Appeared on behalf of the plaintiff;

Mr. J. Albert Woll,
United States District Attorney, by
Mr. John M. Kiely, and
Mr. Arthur L. Jacobs,
Special Assistant to the Attorney General,
Appeared on behalf of the defendant.

63 The Clerk: Number 43 C 318, Wilmette Park District *vs.* Nigel D. Campbell, on trial.

Mr. Kiely: If the Court please, we are waiting for the plaintiff's attorney. He is not here yet.

Mr. Jacobs: He said he would be here at three.

The Court: All right. I can be reviewing the case and making some notes. You have a stipulation, you say?

Mr. Jacobs: We have, sir. Mr. Brandt is not present. It is the final draft submitted.

The Court: All right. You can hand that up. I can be reviewing it while we are waiting for him. He has gone over this, has he?

Mr. Jacobs: Yes, sir. The final draft is submitted to his office.

The Court: Who represents the plaintiff?

Mr. Kiely: Henry J. Brandt of Poppenhusen, Johnston, Thompson & Raymond.

The Court: Poppenhusen, Johnston, Thompson & Raymond?

Mr. Kiely: Yes.

The Court: He will be here, will he?

Mr. Kiely: He will be here.

The Court: B-r-a-n-d-t.

Mr. Kiely: Yes, sir.

The Court: For the defendant will be—

64 Mr. Jacobs: Mr. Kiely and myself.

The Court: Your name?

Mr. Jacobs: Jacobs.

The Court: Assistant Attorney General?

Mr. Jacobs: Yes, sir, Special Assistant.

The Court: While we are waiting for plaintiff's counsel I will be reading the stipulation and the pleadings. Is this suit for a refund?

Mr. Jacobs: Yes, sir.

The Court: Admissions or income tax?

Mr. Jacobs: Admissions tax.

Mr. Brandt: The witness is here, your Honor. We can proceed.

The Court: Do you want to sign this stipulation?

Mr. Brandt: Yes.

The Court: They say it is all ready for your signature.

Mr. Brandt: Yes, sir.

The Court: There is further evidence on behalf of the plaintiff, is there?

Mr. Brandt: Just a little evidence, if the Court please.

The Court: The plaintiff may proceed.

Mr. Brandt: Mr. Spacek, will you please take the stand?

65 LEONARD P. SPACEK, called as a witness on behalf of the plaintiff herein, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Brandt.

Q. What is your name, please?

A. Leonard P. Spacek.

Q. What is your business or profession, Mr. Spacek?

A. I am a public accountant with the firm of Arthur Anderson & Company.

Q. Their Chicago office?

A. Their Chicago office. They have a Chicago office, which is the home office, and also in twenty other cities in the United States and in Europe and in Mexico.

Q. Where do you reside, Mr. Spacek?

A. 1221 Chestnut Avenue, Wilmette, Illinois.

Q. In what way, if any, are you connected with the plaintiff in this suit, with Wilmette Park District?

A. I am one of the Commissioners of the Park District.

Q. One of the five Commissioners elected by the people?

A. Yes, sir.

Q. What other function do you perform on that Commission?

66 A. I am also the Chairman of the Finance Committee.

Q. Are you familiar with the books of account and financial records of the Park District?

A. Yes, sir.

Q. What if anything did you have to do with the preparation of Exhibit 2 attached to the stipulation in this case?

A. It was prepared at my direction and under my supervision.

Q. Now, does this Exhibit 2, Mr. Spacek, show all the charges to the bathing beach that are carried on the books of account of the Park District?

A. Under the caption of that sub-title "Expenditures" in the extreme left hand side, all the expenses of the beach are included as shown on the books, except the amount of taxes, federal taxes, which have been paid under protest and are held in suspense.

Q. Those are the payments of taxes that are involved in this litigation?

A. Yes, sir, approximating $6,000.

Q. They don't show on Exhibit 2?

A. No.

Q. They are carried, you say, in a suspense account?

A. They are carried as an expense under protest,
67 and are not included in this exhibit.

Q. Yes.

A. There are also certain other expenses which are not included herein, and that is that the beach was acquired by the Park District many years ago through funds raised by debt. The interest of that debt and the payments for the beach itself have been charged to the general fund and are not allocated to the beach in any way.

The Court: Q. It is the general fund of the Park District?

A. That is right. In other words, the beach is part of the Park District property.

Mr. Brandt: I understand.

The Witness: There has never been any need to account for the beach as a separate entity standing on its own feet.

Mr. Brandt: Q. As I understand you, then, this exhibit, if it did show such charges which show an additional sum both under the heading of Expenditures and also under the heading of Liabilities at the bottom of that exhibit?

A. That is right. The amount under liabilities would be increased by the amount it would be necessary to borrow from the general fund to pay this tax of $6,000. Therefore,
it would increase the liability shown to approximately
68 $7,000 it would increase the net difference, the difference between receipts and expenditures, the last line of the first table, so that the $42.11 would become a loss of approximately $6,000.

The Court: Q. You don't mean for taxes; you mean for the acquisition of the beach?

A. It would be, if those taxes are charged against these expenditures it would result in a loss.

Q. I see.

A. To the beach.

Mr. Brandt: Q. It would be a further loss?

A. Then, of course, you are entirely right. If the expenses, the interest cost on paying the debt on the beach, that would also, aside from the taxes, increase the loss.

Q. Yes.

A. Of course, if it was operated as a separate entity completely there would be a charge against the beach for the use of that land which under the present circumstances there is no need to make an accounting of that sort.

Q. Now, I direct your attention to the last line on that exhibit under the heading of "Liabilities" due Wilmette Park District general fund.

69 What do you mean by the words "General Fund"?

A. General Fund, I mean the tax funds of the Wilmette Park District.

Q. You mean the funds that are raised by general taxation or imposed upon the assessed valuation of the property in the district?

A. Yes.

Q. And owned by the residents of the district?

A. Yes, sir.

Q. These liabilities on that last line show an invasion of these tax funds of the Park District, is that so?

A. Yes, sir. It shows the amount of the Park District funds that were necessary to make up the deficit in the beach operations as shown on this exhibit. That is the deficit exclusive of the interest charges involved.

Mr. Brandt: You may cross examine, Mr. Jacobs.

The Witness: I would like to make one further statement in respect to these taxes, Mr. Brandt. That is, if the amount is paid the Park District must secure these funds through taxation by levying taxes on the Park District in the Park District levy against the general real estate owners belonging in the Park District.

Mr. Brandt: I see.

The Court: You may cross examine.

70 *Cross-Examination by Mr. Jacobs.*

Q. Mr. Spacek, will you clarify for me, please, what the reference is to note a receivable as of March 31, 1941, Exhibit 2, referring to, I presume, to the liability for 1941?

A. In that, as of March 31, '41, of one year in the history of the beach the accumulated operations of the beach resulted in a surplus of $1,006.33. So that in that one year the beach had paid off all of its liability and had an excess of $1,006.33 in funds, which were as usual given to the general fund and shown as a receivable from the general fund.

That same year, of course, in '41, the beach had a deficit from operations, that is, a loss from operations of $3,779.93, which require a reversal of that position and the general fund had to advance a fund so that the balance of which necessarily was $2,773.60. In other words, that beach had borrowed from the general fund in all years from 1930 to date, except for the year 1941, there was a small balance in the other direction.

Q. Mr. Spacek, several times on direct and cross examination you referred to the term of surplus, deficit
71 that would change all of the accounting.

Q. Let me understand, not based upon municipal accounting practices.

A. Commercial accounting practices, if we followed the commercial accounting practice, we would assume that we would take the last items of special expenditures and capitalize them, write them off during a period of—if we had them over this period, we would also go back to 1930 and take similar items that have been charged to expenses and set them up in the accounts and amortize them so that the charges for the period from 1940 to '44 for all of the expenditures that have been made, that have continuous use or use value over one year, were charged to these years the charge to expense in place of special expenditures might even be greater than the amount of special expenditures.

Q. You don't know how much they would be?

A. It would be very substantial. I don't know how much it would be, no. It would be in thousands of dollars. How much it would be I have not attempted to determine.

I can't give this, because this is a municipal accounting. You are asking that the whole thing be reset on a different basis.

Q. I am not asking that it be re-set on a different basis.

72 A. To determine the profit and loss on a commercial basis you would have to re-set it. You would have to

re-set not only these years, but all the years that have gone by.

Q. For any one year you do not know what had been carried forward from those years?

A. I couldn't say. I have not made that determination.

The Court: Q. It could be made from the books of the plaintiff?

A. It could be made. That is, I mean, it couldn't be made from the books. It would require an exercise of judgment.

Q. The value at the time of the construction and present value?

A. We would have also to go back into the books to determine how much. For instance, we have a beach house there. We wrote that off in the first ten years. We are also still using it.

Q. You always kept your books on this basis?

A. We always kept our books on this basis since 1930, with the one exception of the beach house, which was the initial building of the beach house. That was amortized, I believe, over a ten-year period.

Q. That was built then, in 1930?

73 A. I believe it was 1930.

The Court: Pardon my interruption.

Mr. Jacobs: No. If your Honor has any further questions?

The Court: The only thing I was concerned with the method, whether or not this was a uniform procedure.

Q. When was the Park District started? When was it chartered by the Legislature?

A. That is before my time.

Mr. Brandt: 1907.

The Court: Before your time.

Mr. Brandt: I was in high school.

The Court: Q. 1930, as far as you know, is the only time they ever made a substantial expenditure and charged it to capital expenditure and amortized it over a period of years, that was for a beach house?

A. Actually they did not charge it. As far as accounting, the general fund had raised the money. They loaned it to them. They paid it back to us when they could do so. They

amortized it. In other words, the loan, they just paid off the loan that the general fund made to them to build the beach house.

In effect it was amortized through profits, that is, excess of the collections we had out of ticket increase.

74 Q. You say we loaned it to them. The Park District loaned it to one of their departments?

A. Yes.

Q. It is all one entity?

A. It is all one entity. We only account for it for the purpose of controlling expenses, showing how the billing for the tickets to the beach was just sufficient to cover our expenses. It is just a method of allocating expenses to the users of that beach.

The Court: Q. That is your purpose?

A. That is my purpose.

Mr. Jacobs: I move to strike that.

The Court: We do not have a jury here. I will not be persuaded. I won't guarantee that by the argument of counsel. The argument will be stricken. I am sorry to have interrupted the cross examination.

Mr. Jacobs: No. My cross examination is complete.

The Court: You have no further examination?

Mr. Jacobs: I have no further examination.

The Court: Do you have any redirect, Mr. Brandt?

Mr. Brandt: No redirect. That is all, your Honor.

The Court: Very well. You may step down.

(Witness excused)

75 The Court: Any further evidence on behalf of the plaintiff?

Mr. Brandt: No further evidence.

The Court: Let the record show that the stipulation entered into by counsel this day is filed and received in evidence herein on behalf of both plaintiff and defendant. The plaintiff rests.

Any further evidence on behalf of the defendant?

Mr. Jacobs: There will be no evidence on behalf of the defendant.

The Court: Other than the stipulation.

Mr. Jacobs: Yes; but then at the close of plaintiff's case we would like to file a written motion for a judgment.

The Court: I will take in under advisement.

Mr. Jacobs: Of course.

The Court: Give it to the clerk.

Mr. Jacobs: At this time the government will rest also.

The Court: The defendant rests.

(And thereupon both plaintiff and defendant rested their case.)

The Court: If it is agreeable to counsel, the motion for a directed verdict at the end of the plaintiff's case will
76 be joined and argued by the defendant as one matter, if you are arguing for a finding at the end of all the evidence. I think we have that for preserving the record. I think we will decide the case on the merits based on all of the evidence that is in.

What time do you want for your briefs?

Mr. Brandt: Your Honor, I am working on two briefs now. I am going to have to ask for twenty days.

The Court: That is not unreasonable.

Mr. Brandt: I think I will have it ready by that time.

Mr. Jacobs: I would be more than glad to give counsel thirty days.

Mr. Brandt: Make it thirty days. I will be glad to have it.

The Court: Why don't we make it thirty, thirty and ten for your replication?

Mr. Brandt: That is all right.

The Court: Do you want twenty?

Mr. Brandt: That is all right. I think ten is plenty.

The Court: Thirty, thirty and ten days on the briefs, whereupon all issues presented in this cause will be taken by the Court without further argument.

Mr. Brandt: Yes.

The Court: It is so ordered.

Mr. Jacobs: Could I point out one thing? As I have
77 advised Mr. Brandt, $57.00 of this amount was paid to the preceding collector. There is nothing that can be done about it. As to that amount there is no other defense at all. It is a very small amount, negligible.

The Court: It was paid to the previous collector?

Mr. Jacobs: Yes.

The Court: Mention that in your briefs, will you?

Mr. Jacobs: Yes.

The Court: That will be all.

(Which was all of the proceedings had or evidence presented at the hearing of the above entitled case.)

78 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—43 C 318) * *

CERTIFICATE.

I hereby certify that the above and foregoing is a full, true and accurate transcript of original shorthand notes taken upon the hearing of the above entitled case.

Paul A. Ruhe
Official Court Reporter,
U. S. District Court,
Northern District of Illinois.

December 4, 1946.

80 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—43 C 318) * *

This cause this day being called for trial come the parties by their attorneys, respectively, and the issues being joined the trial of this cause proceeds and at the conclusion of the evidence adduced for the plaintiff the defendant by counsel enters his motion for judgment in his favor and against the plaintiff, ruling thereon being reserved by the Court; the defendant rests upon the stipulation of facts herein and

It Is Ordered that brief and argument of the plaintiff be filed within thirty (30) days from this date, that defendant's brief and argument be filed within thirty (30) days thereafter and that the plaintiff have ten (10) days thereafter within which to file reply brief, whereupon disposition herein will be taken under advisement by the Court without further argument.

96 And afterwards on, to-wit, the 25th day of July, 1947 there was filed in the Clerk's office of said Court a certain Memorandum of the Court in words and figures following, to-wit:

97 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—43 C 318) * *

MEMORANDUM.

Campbell, District Judge.

In this suit to recover certain sums paid under protest, the plaintiff relies on three propositions: (1) That its operation of a bathing beach on park land is a governmental, not a proprietary function, and hence that the federal admissions tax may not be levied against persons paying the charge assessed by the plaintiff for the use of the beach; (2) That the plaintiff's officials may not be required to assist in the collection of federal taxes; (3) That the charge assessed by plaintiff for the use of the beach and its facilities is not an admission charge.

The first proposition raises the constitutional question of the immunity of a state and its subdivisions from the federal taxing power. Constitutional questions, of course, should not be determined by a court unless they are necessarily raised by the case before it. I think that this constitutional question is not necessarily presented by this case, and that it is therefore unnecessary to consider whether the operation of a public bathing beach is a governmental or proprietary function within the sharply limited meaning of "governmental" given in *New York* v. *United States*, 326 U. S. 572. The tax here was levied not upon the plaintiff's operation of the beach, or upon the plaintiff's property, but upon those members of the public who paid the charge levied by the plaintiff as a prerequisite to the use of the beach. The situation here presented is thus different from the one in *New York* v. *United States*, *supra*, in which the federal tax was laid upon the sale by the state of mineral water from state-owned springs, although of course the incidence of the tax may have been on the ulti-

mate consumer, as in the case of the usual sales or excise tax.

The second proposition is refuted by the decision in *Allen* v. *Regents*, 304 U. S. 439, in which the federal admissions tax on admissions to Georgia college football games was upheld. Thus if a federal tax may constitutionally be levied upon a certain type of state activity as it is levied upon corresponding types of activities conducted by private persons, the administrative burden which may be laid upon private persons in the collection of the tax may likewise be laid upon state and local officials.

However, I think the third proposition is valid, and disagree with the defendant's argument that it is immaterial whether or not the plaintiff seeks to operate a public
98 beach at cost or at a profit. In levying a charge which brings in approximately enough revenue to cover the cost of operation, the plaintiff is in fact levying a use tax on those who use its beach facilities, although it is called an admission charge. This ruling is not in conflict with *Allen* v. *Regents*, *supra*, in which the federal admissions tax was upheld as applied to purchasers of tickets to state university football games. The revenue from collegiate football games is obviously not intended merely to equal the cost of maintaining the football stadium. If a public beach is operated for profit, the charge for tickets would not be a use tax but an admission within the meaning of section 1700 of the Internal Revenue Code.

The defendant makes the point that the third proposition argued by the plaintiff in its brief was not raised in the complaint and therefore is not before the court. In view of the policy behind the rule allowing amendment of pleadings to conform to proof, and of the fact that the defendant does not plead surprise, I think that the third proposition should not be stricken.

The defendant's motion for judgment is therefore denied. The plaintiff is entitled to judgment for the sum paid under protest, and interest, except for the sum of $57.20 paid to the defendant's predecessor in 1942.

Counsel for the plaintiff may prepare and file with the Court, in writing, within twenty days from the date hereof, proposed findings of fact, conclusions of law and a draft

of a proposed decree, consistent with the views herein expressed, delivering copies thereof to counsel for the defendant. Within twenty days of the receipt of such copies, counsel for the defendant may prepare and file with the Court, in writing, his observations with reference thereto and suggestions for the modification thereof, delivering a copy of such observations and suggestions to counsel for the plaintiff. Within ten days thereafter counsel for the plaintiff may present to the Court, in writing, his reply to such observations and suggestions. Whereupon, the matter of making findings of fact, conclusions of law and a decree herein will be taken by the Court without further argument.

Campbell

Judge.

July 25, 1947.

101 And afterwards on, to-wit, the 14th day of August, 1947 came the Defendant by his attorneys and filed in the Clerk's office of said Court his certain Notice And Motion For New Trial in words and figures following, to-wit:

102 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—43 C 318) * *

NOTICE.

To: Mr. Henry J. Brandt,
c/o Poppenhusen, Johnston, Thompson & Raymond,
11 South La Salle Street,
Chicago, Illinois.

Please take notice that on Thursday, August 14, 1947, at the opening of court in the forenoon, or as soon thereafter as counsel may be heard, I shall appear before the Honorable Philip L. Sullivan, in the room usually occupied by him as a court room, United States Courthouse, Chicago, Illinois, or before whoever may be presiding in his place and stead, and shall then and there ask leave of court to file a motion for a new trial in the above case, a copy of

said motion being herewith served upon you, and to have said motion set down for hearing on a day certain; at which time and place you may appear if you so desire.

Otto Kerner, Jr.
Otto Kerner, Jr.,
United States Attorney.
Attorney for Defendant.

Received copy of the above Notice,
together with copy of the Notion
referred to therein, this.....day
of August, A. D. 1947.
Henry J. Brandt
Attorney for Plaintiff.

103 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—43 C 318) * *

MOTION FOR NEW TRIAL.

The defendant respectfully moves the court for a new trial, for a rehearing upon the ruling of the court in the memorandum dated July 25, 1947, that the charge assessed by the plaintiff for the use of the beach and facilities is not an admission charge, and that judgment be entered for the defendant dismissing the complaint for the following reasons:

1. The aforesaid ruling of the court is in conflict with the ruling laid down in the controlling decision of the United States Circuit Court of Appeals for the Seventh Circuit in *Exmoor Country Club* v. *United States*, 119 F. 2d 961, in which the taxpayer contended, first, that the charges paid for the use of its swimming pool and skating rinks was not for "admission" and, secondly, that the admissions tax was inapplicable because the premises and activities were not open to the public and had not been carried on nor its facilities operated for profit. The Circuit Court rejected this contention reversing the decision of the court below and specifically ruling to the contrary as follows (p. 963):

In our case neither guest nor member would have been

admitted to the pool or rink without the payment of an admission charge, consequently, the payment of the charge for the guest was for his admission to and use of the pool and rink.

104 Second, Appellee contends that the statute is inapplicable because its premises and activities are not open to the public nor operated for profit and counsel argues that the intent of the statute was to reach admissions to public activities carried on for profit. To be sure, if doubt exists as to the construction of a taxing statute, that doubt should be resolved in favor of the taxpayer, but that is no reason for creating a doubt where none exists. The language of the statute now considered is plain and unambiguous. There is nothing in the language of the statute from which it can be inferred that Congress intended that the statute shall apply only to activities open to the public or to those conducted for profit. It clearly imposes the tax on amounts paid for admission to any place. Had Congress intended restricting taxable admissions solely to those charged as public places operated for profit, it would have specifically exempted such admission, as it has exempted the proceeds inuring exclusively to the benefit of religious, educational and charitable organizations and others mentioned in the statute.

2. The aforesaid ruling of this Court in the case at bar is in conflict with the decision of this Court in *Dashow* v. *Harrison*, No. 44-C-876, decided February 8, 1946, and unofficially reported in 1946 P-H, par. 72, 405. The question involved in that case was the same question presented in the aforesaid ruling of this Court under virtually identical facts: Whether the charges paid by the taxpayer for the use of the bathing beach of the Glencoe Park District was paid for "admission" within the meaning of this statute. The court found as a fact:

> The revenues derived by the District from general property taxes for the year 1943 and for a number of years both prior and subsequent thereto have not been sufficient to enable the District to maintain and operate all of its facilities and parks and also at the same time to pay all the costs and expenses of operating, maintaining and regulating Glencoe Beach. The charge for

beach tickets was fixed to approximate the cost of the beach. The receipts, however, did not during the taxable year equal the cost of maintaining the beach and such deficits as existed were paid out of funds raised by federal taxes.

The court specifically ruled in its conclusions of law that:

1. The charge of $3.00 which the plaintiff paid in 1943 for the season ticket to enter and use Glencoe Beach was paid for admission to a place within the meaning of Internal Revenue Code, Section 1700(a).

105 2. The tax of thirty cents which was collected by the Park District from the plaintiff in connection with the issuance of the season ticket of admission was properly imposed under the federal statute.

3. The ruling of the court is inconsistent with and contradicted by the stipulated facts, that plaintiff "makes a charge to all persons for admission to the bathing beach and issues tickets to all persons desiring to use the aforesaid beach" and that the taxes in question were assessed and collected "on the amount paid as admission to the bathing beach." (Stip. par. 8, 15, 16, 17.)

Otto Kerner, Jr.
United States Attorney
Attorney for Defendant.

106 And on the same day, to-wit, on the 14th day of August, 1947 being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Philip L. Sullivan District Judge, appears the following entry, to-wit:

107 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—43 C 318) * *

Comes now the defendant by the United States Attorney and presents his motion for a new trial and it is

Ordered that said motion be entered and that it be and is hereby set for hearing on September 12, 1947, before the Honorable William J. Campbell, one of the Judges of this Court.

108 And afterwards on, to-wit, the 8th day of September, 1947 came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Proposed Findings Of Fact And Conclusions Of Law in words and figures following, to-wit:

109 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—43 C 318) * *

PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This cause came on for trial and the court having heard the evidence and considered the stipulations of the parties, finds the facts and states the conclusions of law as follows:

Findings of Fact.

1. Plaintiff is a body politic and corporate, organized in 1908 under the provisions of a statute of the State of Illinois, approved June 24, 1895, entitled "An Act to provide for the Organization of Park Districts and the transfer of submerged lands to those bordering on navigable bodies of water," (Illinois Revised Statutes, 1945, c.105, pars. 256 through 295).

2. Plaintiff is administered by a Board of Commissioners under the provisions of the aforesaid Illinois statutes, elected by the people residing in the District. The first Board of Commissioners was elected at a general election held in pursuance of the statute on January 14, 1908, and the declaration of the result of such public election was made by an order of the County Court of Cook County entered January 17, 908.

3. Nigel D. Campbell was and is Collector of Internal Revenue for the First District of Illinois since January, 1 1945.

4. The Wilmette Park District consists of an area of approximately 2.8 square miles, located within the incorporated area of the Village of Wilmette in Cook County, Illinois, a village organized and existi -der and by virtue

of Chapter 24 of the Statutes of the State of Illinois, An Act known as the Revised Cities and Villages Act, which village has a population of approximately 20,000. Included within the District are four park areas aggregating approximately .78 square miles. The largest park area, known as Washintgon Park, extends along the shore of Lake Michigan for approximately three-fourths of a mile. The land area of Washington Park was acquired partly by a grant from the State of Illinois, partly by purchase and partly by the exercise of the right of eminent domain.

5. For more than twenty-five years, the riparian property of the Wilmette Park District at the north end of Washingeon Park and in the shoal waters of Lake Michigan adjacent thereto has been used as a bathing beach during the summer months.

6. During the years 1941 through 1944, the plaintiff supplied the following services and facilities for use in conjunction with the bathing beach: a bath house containing clothing lockers, toilets and wash rooms, an automobile parking area, life saving equipment, flood lighting, drinking fountains, showers, spectator benches, bicycle racks, first aid personnel and supplies.

7. The plaintiff employes the following classes of employees for work in connection with the operation and
111 maintenance of the bathing beach; a beach superintendent, a secretary, beach maintenance labor, life guards, check room and gate check workers, general office workers and policemen.

8. The bathing beach is controlled, maintained and operated solely by the Wilmette Park District and not by a private individual.

9. The Park District issues two types of tickets to users of the beach and beach facilities: (1) a family ticket for use of a citizen and members of his family and guests for the entire season and (2) a single daily admission which is 50c for week days and $1.00 for Saturdays.

10. The charge made by the Park District for use of the beach and beach facilities is made to cover maintenance and operation but the charges thus made have never fully supported the operation of the beach facilities. A substantial portion of the costs of operation and maintenance

in every year have been paid out of tax revenues collected by the Park District from general taxation. The charge for the use of the beach and beach facilities has never produced income and was not intended to produce net income or profit to the Park District.

11. From Gary, Indiana to Lake Bluff, Illinois there are 29 municipally operated bathing beaches, some of which do and some of which do not charge admissions. From South Chicago to Highland Park, Illinois there are 15 Lake Michigan bathing beaches operated by private persons for profit, of which 9 charge admissions and 6 are operated by hotels and clubs for the use of their patrons, residents and members without any express or specific admission charge.

12. On July 24, 1941 the plaintiff received a written notice from the Office of the Collector of Internal Revenue for the First District of Illinois directing it to collect
112 an admissions tax of 10% on all bathing beach tickets sold on and after July 25, 1941.

13. The Wilmette Park District did not, during the year 1941, or in any prior years, collect from purchasers who paid admissions to its bathing beach facilities any amount to cover the admissions tax alleged to have been imposed by the Admissions Tax Act, (53 Stat. 189, as amended c. 10, Title 26, U.S.C.A., sec. 1700).

14. In June of 1942 the United States Commissioner of Internal Revenue, hereinafter called the Commissioner, made an assessment against the plaintiff of $57.20 as the amount due from the plaintiff under the provisions of Section 1718 of the Internal Revenue Code with respect to the tax due under Section 1700 of the Internal Revenue Code on the amounts paid as admissions to the bathing beach of the plaintiff from July 25, 1941 to October 1, 1941. This amount was paid on June 20, 1942. A claim for refund of this amount was filed with the Collector of Internal Revenue on July 17, 1942 and was rejected by letter from the Commissioner of Internal Revenue of December 22, 1942.

15. Subsequently the Commissioner made assessments against the plaintiff aggregating $3,979.43 as the amounts due from the plaintiff under the provisions of Section 1718 of the Internal Revenue Code with respect to the taxes due under Section 1700 of the Internal Revenue Code on the

amounts paid as admissions to the bathing beach of the plaintiff during the years 1942, 1943 and 1944, plus interest on the principal amount of the tax and the amounts due under Section 3655 (b) of the Internal Revenue Code for failure to pay said tax on demand. This aggregate
113 amount was paid on May 15, 1945. A claim for refund of this amount was filed with the defendant on June 29, 1945 and was rejected by letter dated January 11, 1946.

16. Subsequently the Commissioner made an assessment against the plaintiff of $2,103.30 as the amount due from the plaintiff under the provisions of Section 1718 of the Internal Revenue Code with respect to the taxes under Section 1700 of the Internal Revenue Code on the amount paid as admissions to the bathing beach of the plaintiff during 1945. This amount was paid on November 20, 1945. A claim for refund of this amount was filed with the defendant on December 19, 1945 and was subsequently rejected.

Conclusions of Law.

1. It is unnecessary to consider whether the operation of a public bathing beach is a governmental or proprietary function since the tax was levied not upon plaintiff's operation of the beach or upon its property but upon the members of the public who paid the charge levied by the plaintiff as a prerequisite to the use of the beach. The constitutional question of the immunity of a state and its subdivisions from said taxing power need not, therefore, be determined.

2. That plaintiff's commissioners may not be required to assist in the collection of federal taxes is part and parcel of the question of the constitutionality of a tax levied against persons paying the charge assessed by the plaintiff for the use of the beach. A federal tax may constitutionally be levied upon a state activity, as it is levied upon corresponding types of activities conducted by private persons and the admiinstrative burden may be laid upon state and local officials.

114 3. The charge assessed by plaintiff for the use of the beach and its facilities is not an admission charge but a use tax imposed upon those who use its facilities. It is a single license fee paid by the head of a family for multiple

use of all members of the family during the year or by an individual for the privilege of using beach facilities, to defray part of plaintiff's cost of maintaining, operating and regulating the beach and its facilities. No profit results from pliantiff's operation and part of the cost of maintaining, operating and regulating the beach facilities are paid out of general funds by taxation. The charge is, therefore, not an admission within the meaning of the act in question.

It Is Therefore Ordered And Adjudged that judgment be entered for the plaintiff for the sum of $6082.73 with interest on $3979.43 thereof from May 15, 1945 and upon $2103.30 thereof from November 20, 1945 at the rate of six percent per annum.

Enter.....

Judge.

115 And on the same day, to-wit, the 8th day of September, 1947 came the Defendant by his attorneys and filed in the Clerk's office of said Court his certain Proposed Findings Of Fact And Conclusions Of Law in words and figures following, to-wit:

116 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—43 C 318) * *

DEFENDANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The defendant respectfully requests the court to make and enter the Findings of Fact and Conclusions of Law attached hereto.

Otto Kerner, Jr.
United States Attorney
Attorney for Defendant.

117 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—43 C 318) * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Findings of Fact.

1. The court finds as facts all of the facts included in the stipulation of facts entered into between counsel for the plaintiff and counsel for the defendant filed with the court and received in evidence.

Conclusions of Law.

1. The admissions tax imposed by Section 1700, et seq, of the Internal Revenue Code, as applied to the amounts paid as admission to the bathing beach operated by the plaintiff does not violate the Constitution of the United States.

2. The provisions of Sections 1715 and 1716 of the Internal Revenue Code imposing upon the plaintiff's officials and employees the duty of assisting in the collection of such admissions tax do not violate the Constitution of the United States.

3. The charge made by the plaintiff to all persons for admission to the bathing beach is the amount "paid for admission to any place" within Section 1700 of the Internal Revenue Code.

118 4. The amount paid to the plaintiff as admission to the plaintiff's beach is subject to the tax imposed by Section 1700 of the Internal Revenue Code.

5. The plaintiff owes the amount of said taxes under the provisions of Section 1718 of the Internal Revenue Code assessed and collected from the plaintiff.

6. This suit may not be maintained against the defendant for the recovery of amounts paid to the defendant's predecessor in office.

7. The defendant is entitled to judgment dismissing the complaint.

.....

District Judge.

Received copy of the foregoing Findings of Fact and Conclusions of Law.

Poppenhusen, Johnston,
Thompson & Raymond,
Attorneys for Plaintiff.

119 And on the same day, to-wit, the 8th day of September, 1947 came the Defendant by his attorneys and filed in the Clerk's office of said Court his certain Objections To Plaintiff's Proposed Findings Of Fact And Conclusions Of Law in words and figures following, to-wit:

120 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—43 C 318) * *

OBJECTIONS TO PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

1. The defendant objects to the plaintiff's proposed findings of fact because it omits paragraphs 8, 9, 10 and 11 of the stipulation of facts filed with the court and received in evidence.

2. The defendant objects to plaintiff's proposed finding of fact No. 9 and particularly, the word "users" therein, because there is no evidence to support such a finding, for the reasons stated in the defendant's motion for new trial and for the further reason that it is contrary to the stipulated facts and particularly (Stipulation, par. 8)—

> The Wilmette Park District makes a charge to all persons for admission to the bathing beach and issues tickets to all persons desiring to use the afresaid beach, facilities and services,
>
> * * *

3. The defendant objects to proposed finding of fact No. 10 for the reason that the facts stated herein are contrary to the evidence, are clearly erroneous and are unsupported by any substantial evidence.

4. The defendant objects to conclusion of law No. 2 for the reasons that:

121 (a) The first sentence of said conclusions has no support in the ruling of the court in the court's memorandum dated July 25, 1947.

(b) The second sentence of said conclusion fails to state the complete general ruling upon which the court specifically ruled against the plaintiff upon the plaintiff's second contention, as stated in the court's memorandum dated July 25, 1947.

(c) The second sentence of said conclusion fails to state the specific ruling of the court in the court's memorandum dated July 25, 1947, that the plaintiff's officials may constitutionally be required to assist in the collection of the federal admissions tax imposed under Section 1700 of the Internal Revenue Code to any amount which may have been paid for admission to the bathing beach operated by the plaintiff.

5. The defendant objects to conclusion of law No. 3 because the facts stated therein are contrary to the evidence, are unsupported by any substantial evidence, are clearly erroneous, and for the further reason that the conclusions of law stated therein, based on such facts, are erroneous for the reasons stated in the defendant's motion for new trial.

Otto Kerner, Jr.
United States Attorney
Attorney for Defendant.

Received copy of the above and foregoing Objections to Plaintiff's Proposed Findings of Fact and Conclusions of Law this 8 day of September, 1947.

Poppenhusen, Johnston,
Thompson & Raymond,
Attorneys for Plaintiff.

126 And afterwards, to-wit, on the 12th day of September, 1947 being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell District Judge, appears the following entry, to-wit:

127 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—43 C 318) * *

The motion of the Defendant for a new trial is hereby taken under advisement by the Court to be ruled upon, at the suggestion of the parties by counsel, at the same time the Court rules on the findings of fact, conclusions of law and judgment order.

128 And afterwards on, to-wit, the 15th day of September, 1947 came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Answer To Objections To Plaintiff's Proposed Findings Of Fact And Conclusions Of Law in words and figures following, to-wit:

129 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—43 C 318) * *

ANSWERS TO OBJECTIONS TO PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

1. The first objection that the Findings of Fact of Plaintiff leave out Paragraphs 8, 9, 10 and 11 of the Stipulation is in error. Paragraph 8 of the Stipulation was rewritten as Paragraph 9 in our suggested Findings of Fact to take account of the exhibits, namely specimens of the two types of tickets used at the bathing beach. The tickets on their face show what we say of them in the ninth Finding of Fact. We believe the Court's findings should not merely reiterate the Stipulation but should state the ultimate facts.

Paragraph 9 of the Stipulation is merely a statement that Exhibit 1 contains specimen copies of tickets issued for each type of admission. Our finding number 9 clearly describes those exhibits.

Paragraph 10 of the Stipulation we regarded as immaterial but we have no objection to its being included in the findings.

Paragraph 11 of the Stipulation is merely a statement characterizing Exhibit 2. In finding number 10 we state
130 the ultimate facts revealed by that exhibit and by the testimony with reference thereto of the sole witness in the case.

2. Objection number 2, that Finding of Fact number 9 is contrary to Paragraph 8 of the Stipulation is true, but Paragraph 9 of the Stipulation agreeing upon the terms of the tickets and attaching the tickets themselves controls Paragraph 8 because on the face of the tickets themselves they are shown to be "issued to.....and members of

family." Finding number 9 is clearly supported by Exhibit 1, excepting only that it does not support any reference to the word "guests" which word and the conjunction preceding it in line three of Finding of Fact number 9 the plaintiff is willing to have stricken.

3. Defendant's objection to finding number 10 is without merit. The accounting Exhibits number 2, stipulated to in Paragraph 11 and the testimony of the witness Spacek with reference thereto clearly supports finding number 10.

4. Objection 4a, b and c is a criticism of our interpretation of a portion of the Court's memorandum of opinion of July 24, 1947. Adversary counsel's construction appears in his Conclusion of Law number 2. We believe our Conclusion of Law number 2 more accurately states what the Court intended to say.

5. Objection number 5 is purely argumentative and we believe from what we have already said under paragraphs 2 and 3 that there can be no doubt that Conclusion of Law number 3 is supported by the record.

Henry J. Brandt,
Attorney for Plaintiff.

Poppenhusen, Johnston, Thompson
& Raymond
11 South LaSalle St.
Of Counsel.

131 And afterwards, to-wit, on the 29th day of September, 1947 being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell District Judge, appears the following entry, to-wit:

132 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—43 C 318) * *

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT.

Findings of Fact.

1. Plaintiff is a body politic and corporate, organized in 1908 under the provisions of a statute of the State of Illinois, approved June 24, 1895, entitled "An Act to provide for the Organization of Park Districts and the transfer of submerged lands to those bordering on navigable bodies of water," (Illinois Revised Statutes, 1945, c. 105, pars. 256 through 295).

2. Plaintiff is administered by a Board of Commissioners under the provisions of the aforesaid Illinois statutes, elected by the people residing in the District. The first Board of Commissioners was elected at a general election held in pursuance of the statute on January 14, 1908, and the declaration of the result of such public election was made by an order of the County Court of Cook County entered January 17, 1908.

3. Nigel D. Campbell was and is Collector of Internal Revenue for the First District of Illinois since January 1, 1945 for the duration of the period in suit.

4. The Wilmette Park District consists of an area of approximately 2.8 square miles, located within the incorporated area of the Village of Wilmette in Cook County, Illinois, a village organized and existing under and by virtue of Chapter 24 of the Statutes of the State of Illinois, an act known as the Revised Cities and Villages Act, which village has a population of approximately 20,000. Included

within the District are four park areas aggregating approximately .78 square miles. The largest park area, known as Washington Park, extends along the shore of Lake Michigan for approximately three-fourths of a mile. The land area of Washington Park was acquired partly by a grant from the State of Illinois, partly by purchase, and partly by the exercise of the right of eminent domain.

5. For more than twenty-five years, the rigarian property of the Wilmette Park District at the north end of Washington Park and in the shoal waters of Lake Michigan adjacent thereto has been used as a bathing beach during the summer months.

133 6. During the years 1941 through 1944, the plaintiff supplied the following services and facilities for use in conjunction with the bathing beach: a bath house containing clothing lockers, toilets and wash rooms, an automobile parking area, life saving equipment, flood lighting, drinking fountains, showers, spectator benches, bicycle racks, first aid personnel and supplies.

7. The plaintiff employs the following classes of employees for work in connection with the operation and maintenance of the bathing beach: a beach superintendent, a secretary, beach maintenance labor, life guards, check room and gate check workers, general office workers, and policemen.

8. The bathing beach is controlled, maintained, and operated solely by the Wilmette Park District and not by a private individual.

9. The bathing beach facilities are utilized principally by residents of the Wilmette Park District, but its facilities are also utilized by non-residents.

10. The Park District makes two types of charges to users of the beach and beach facilities: (1) a flat rate for a season ticket, issued on either an individual or a family basis, and (2) a single daily admission charge of 50c on week days and $1.00 on Saturdays, Sundays, and holidays, for which no tickets are issued.

11. The charge made by the Park District for use of the beach and beach facilities is made to cover maintenance, operation, and some capital improvements. Over the years

the charge for the use of the beach and beach facilities is intended merely to approximate these costs, and not to produce net income or profit to the Park District.

12. From Gary, Indiana to Lake Bluff, Illinois there are 29 municipally operated bathing beaches, some of which do and some of which do not charge admissions. From South Chicago to Highland Park, Illinois there are 15 Lake Michigan bathing beaches operated by private persons for profit, of which nine charge admissions and six are operated by hotels and clubs for the use of their patrons, residents, and members without any express or specific admission charge.

13. On July 24, 1941 the plaintiff received a written notice from the Office ofthe Collector of Internal Revenue for the First District of Illinois directing it to collect an admission tax of 10% on all bathing beach tickets sold on and after July 25, 1941.

14. The Wilmette Park District did not, during the year 1941, or in any prior years, collect from purchasers who paid admissions to its bathing beach facilities any amount to cover the admissions tax alleged to have been imposed by the Admissions Tax Act (53 Stat. 189, as amended, c. 10, Title 26, U. S. C. A., sec. 1700).

15. In June of 1942 the United States Commissioner of Internal Revenue, hereinafter called the Commissioner, made an assessment against the plaintiff of $57.20 as the amount due from the plaintiff under the provisions of Section 1718 of the Internal Revenue Code with respect to the tax due under Section 1700 of the Internal Revenue Code on the amounts paid as admissions to the bathing beach of the plaintiff from July 25, 1941 to October 1, 1941. This amount was paid on June 20, 1942. A claim for refund of this amount was filed with the Collector of Internal Revenue on July 17, 1942 and was rejected by letter from the Commissioner of Internal Revenue of December 22, 1942.

134 16. Subsequently the Commissioner made assessments against the plaintiff aggregating $3,979.43 as the amounts due from the plaintiff under the provisions of Section 1718 of the Internal Revenue Code with respect to

the taxes due under Section 1700 of the Internal Revenue Code on the amounts paid as admissions to the bathing beach of the plaintiff during the years 1942, 1943, and 1944, plus interest on the principal amount of the tax and the amounts due under Section 3655 (b) of the Internal Revenue Code for failure to pay said tax on damand. This aggregate amount was paid on May 15, 1945. A claim for refund of this amount was filed with the defendant on June 29, 1945 and was rejected by letter dated January 11, 1946.

17. Subsequently the Commissioner made an assessment against the plaintiff of $2,103.30 as the amount due from the plaintiff under the provisions of Section 1718 of the Internal Revenue Code with respect to the taxes under Section 1700 of the Internal Revenue Code on the amount paid as admissions to the bathing beach of the plaintiff during 1945. This amount was paid on November 20, 1945. A claim for refund of this amount was filed with the defendant on December 19, 1945 and was subsequently rejected.

Conclusions of Law.

1. It is unnecessary to consider whether the operation of a public bathing beach is a governmental or proprietary function, since the tax was levied not upon plaintiff's operation of the beach or upon its property but upon the members of the public who paid the charge levied by the plaintiff for the use of the beach. The constitutional question of the immunity of a state and its subdivisions from the federal taxing power need not therefore be determined.

2. The provisions of Section 1715 and 1716 of the Internal Revenue Code imposing upon state and local government officials and employees the duty of assisting in the collection of an admissions tax does not violate the Constitution of the United States.

3. Under the facts of this case, the charge assessed by the plaintiff, whether for "admission" to, or for the "use" of, its publicly owned and operated bathing beach is not an admission charge within Section 1700 of the Internal Revenue Code, but is a method of imposing a use tax upon those members of the public who use the beach and its facilities.

Judgment.

This cause having come on for trial, and the court having considered the stipulation of facts and the other evidence adduced at the trial, and having herewith entered its findings of fact and conclusions of law,

It Is Therefore Ordered and Adjudged that plaintiff recover of the defendant the sum of $6,082.73, with interest on $3979.43 thereof from May 15, 1945 and on $2103.30 thereof from November 20, 1945 at the rate of six percent per annum.

Enter:
Campbell
U.S.D.J.

September 29, 1947.

135 And on the same day, to-wit, the 29th day of September, 1947, being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell District Judge, appears the following entry, to-wit:

136 In the District Court of the United States.

* * (Caption—43 C 318) * *

This cause having been heretofore taken under advisement on the motion of the defendant for a new trial after due deliberation and the Court being fully advised in the premises it is

Ordered that said motion for a new trial be and it is hereby denied.

137 And afterwards on, to-wit, the 26th day of November, 1947 came the Defendant by his attorneys and filed in the Clerk's office of said Court his certain Notice Of Appeal in words and figures following, to-wit:

138 IN THE UNITED STATES DISTRICT COURT.

Northern District of Illinois,

Eastern Division.

Wilmette Park District, a Municipal corporation,
Plaintiff,
vs.
Nigel D. Campbell, Collector of Internal Revenue,
Defendant.
} No. 43 C 318.

NOTICE OF APPEAL.

Notice is hereby given that Nigel D. Campbell, Collector of Internal Revenue for the First District of Illinois, the defendant above named, by his attorney, Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, hereby appeals to the United States Circuit Court of Appeals for the Seventh Circuit from the final judgment entered in this action on September 29, 1947, in favor of the plaintiff and against the defendant.

Otto Kerner, Jr.
Otto Kerner, Jr.,
United States Attorney,
Attorney for Defendant.

139 State of Illinois }
County of Cook } ss.

William Sheehan, being first duly sworn, on oath deposes and says that he is employed as Clerk in the office of the United States Attorney at Chicago, Illinois; that on the 26th day of November 1947 he placed a copy of the foregoing

Notice of Appeal in a Government franked envelope addressed to the following:

Mr. Henry J. Brandt,
c/o Poppenhusen, Johnston, Thompson
and Raymond,
11 S LaSalle Street,
Chicago, Illinois,

and that he deposited said envelope, so addressed and containing said copy of Notice of Appeal, in the United States Mail Chute located in the United States Courthouse, Chicago, Illinois, on said date.

William Sheehan.

Subscribed and sworn to before
me this 26 day of November 1947.
Anna L. Minahan
(Seal) *Notary Public*

(Attached Hereto Is The Following Certificate):

140 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—43 C 318) * *

CERTIFICATE OF MAILING

I, Roy H. Johnson, Clerk of the United States District Court, for the Northern District of Illinois, Eastern Division, keeper of the Seal and Records of said Court, do hereby certify that on the 26th day of November, 1947, in accordance with Rule 73 (b) of the Rules of Civil Procedure for District Courts of the United States, I mailed a copy of the foregoing Notice of Appeal to the following attorneys of record:

Henry J. Brandt
Poppenhusen, Johnston, Thompson and
Raymond
Chicago 3, Illinois

(Seal) Roy H. Johnson
Roy H. Johnson, Clerk.

143 And afterwards on, to-wit, the 20th day of January, 1948 came the Defendant-Appellant by his attorneys and filed in the Clerk's office of said Court his certain Statement Of Points in words and figures following, to-wit:

144 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—43 C 318) * *

DEFENDANT-APPELLANT'S STATEMENT OF POINTS.

To The Clerk Of The United States District Court For The Northern District Of Illinois:

You are hereby notified that the defendant-appellant intends to rely in his appeal on the following points:

The District Court erred —

(1) In not granting the defendant's motion for judgment.
(2) In not granting the defendant's motion for new trial.
(3) In not making and entering all of the stipulated facts as findings of fact as proposed by the defendant.
(4) In not making and entering the conclusions of law proposed by the defendant.
(5) In entering findings of fact Nos. 10 and 11.
(6) In the conclusions of law contained in paragraphs Nos. 1, 2 and 3 of conclusions of law entered by the court.
(7) Entering judgment for the plaintiff.

Otto Kerner, Jr.
United States Attorney,
Attorney for Defendant-Appellant.

Received Copy of the foregoing Defendant-Appellant's Statement of Points this 20th day of January, 1948.

Henry J. Brandt
Henry J. Brandt
Attorney for Plaintiff-Appellee.

145 And on the same day, to-wit, on the 29th day of December, 1947 being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes District Judge, appears the following entry, to-wit:

146 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—43 C 318) * *

ORDER.

On stipulation of the parties hereto, by their respective attorneys, and the Court having jurisdiction and being fully advised in the premises

It Is Ordered that the time within which the defendant-appellant may complete and docket his record on appeal in the above case be, and it is hereby, extended to and including Februery 24, 1948.

Dated: December 29, 1947.

Enter:

Barnes

Judge.

147 And on the same day, to-wit, the 20th day of January, 1948 came the Defendant-Appellant by his attorneys and filed in the Clerk's office of said Court his certain Designation Of Contents Of Record On Appeal in words and figures following, to-wit:

148 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—43 C 318) * *

APPELLANT'S DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

To The Clerk Of The District Court Of The United States For The Northern District Of Illinois, Eastern Division:

You are hereby requested to include in the record on appeal herein—

(1) The complete record and all the proceedings and evidence in this case.

(2) This designation of the contents of the record on appeal.

This transcript is to be prepared as required by law and the rules of this Court and the rules of the United States Circuit Court of Appeals for the Seventh Circuit, and is to be filed in the office of the Clerk of said Circuit Court of Appeals at Chicago, Illinois.

Dated this ..... day of January, 1948.

Otto Kerner, Jr.
United States Attorney
Attorney for Defendant-Appellant

149 Received copy of the foregoing Appellant's Designation of Contents of Record on Appeal this 20th day of January, 1948.

Henry J. Brandt
Henry J. Brandt
Attorney for Plaintiff-Appellee.

152 Northern District of Illinois } ss.
Eastern Division

I, Roy H. Johnson, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with the Designation filed in this court in the cause entitled: *Wilmette Park District, a Municipal corporation, Plaintiff*, vs. *Nigel D. Campbell, Collector of Internal Revenue, Defendant*, No. 43 C 318, as the same appear from the original records and files thereof now remaining among the records of the said Court in my office, except the original exhibits numbered 1 and 2 which are incorporated herein by direction of this Court.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 13th day of February, 1948.

(Seal) Roy H. Johnson
Clerk.

153 IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For The Seventh Circuit.

Wilmette Park District,
a Municipal corporation,
Plaintiff-Appellee,
vs.
Nigel D. Campbell, Collector of
Internal Revenue,
Defendant-Appellant.

No. 9567

STIPULATION.

(Filed Mar 16, 1948—Kenneth J. Carrick, Clerk)

It is hereby stipulated and agreed by and between the parties hereto, by their respective counsel, that the transcript of the record to be printed herein, be limited to the following:

1. Amended and Supplemental Complaint filed on April 2, 1946.
2. Answer to Amended and Supplemental Complaint, filed May 20, 1946.
3. Defendant's Motion for Judgment filed on December 4, 1946.
4. Stipulation of Facts and Exhibits thereto received in evidence December 4, 1946.
5. Transcript of Proceedings before Judge Campbell on December 4, 1946.
6. Order of December 4, 1946 showing cause called for trial; evidence heard for plaintiff; ruling reserved on defendant's motion for judgment; defendant rests upon the stipulation of facts; briefs to be filed and cause to be taken under advisement without further argument.

7. Memorandum Opinion dated July 25, 1947, finding for plaintiff.

154 8. Defendant's Motion for New Trial filed August 14, 1947.

9. Order dated August 14, 1947 granting leave to defendant to file Motion for New Trial and setting Motion for hearing on September 12, 1947.

10. Plaintiff's Proposed Findings of Fact and Conclusions of Law filed September 8, 1947.

11. Defendant's Proposed Findings of Fact and Conclusions of Law filed September 8, 1947.

12. Defendant's Objections to Plaintiff's Proposed Findings of Fact and Conclusions of Law, filed September 8, 1947.

13. Order entered September 12, 1947, motion of defendant for new trial taken under advisement, to be ruled on at time Court rules on Findings of Fact and Conclusions of Law.

14. Answer to Objections to Plaintiff's Proposed Findings of Fact and Conclusions of Law filed September 15, 1947.

15. Findings of Fact and Conclusions of Law and Judgment Order entered September 29, 1947.

16. Order dated September 29, 1947 denying defendant's motion for new trial.

17. Notice of Appeal filed November 26, 1947.

18. Order on stipulation of parties extending time to February 24, 1948 for completing and docketing record on appeal.

19. Defendant-Appellant's Designation of Contents of Record on Appeal filed January 20, 1948.

20. Defendant-Appellant's Statement of Points filed January 20, 1948.

It is further stipulated and agreed that any portion of the record in this case, not printed pursuant to this stipulation, may be considered by the Circuit Court of Appeals in the original form if the members of said Court desire so to do.

It is further stipulated and agreed that the parties
155 hereto may use any part of the original record and refer to the same in their briefs whether it appears in the printed record or not.

/s/ G. H. Hennessey, Jr.
/s/ Henry J. Brandt
Counsel for Plaintiff-Appellee.
/s/Otto Kerner, Jr.
Counsel for Defendant-Appellant.

Approved:
William M. Sparks, C. J.

Mar. 16, 1948

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed transcript of the record filed in this office on August 5, 1948, in:

Cause No. 9567.

Wilmette Park District,
Plaintiff-Appellee,

vs.

Nigel D. Campbell, Collector of Internal Revenue,
Defendant-Appellant,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 19th day of April, A. D. 1949.

Kenneth J. Carrick,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit held in the City of Chicago and begun on the seventh day of October, in the year of our Lord one thousand nine hundred and forty-seven, and of our Independence the one hundred seventy-second.

Wilmette Park District, *Plaintiff-Appellee,* vs. Nigel D. Campbell, Collector of Internal Revenue, *Defendant-Appellant.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

9567

And afterward, to-wit, on the fourteenth day of February, 1948, there was filed in the office of the Clerk of this Court an appearance of counsel for the appellant, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Case No. 9567.

Harrison, Collector of Internal Revenue,
Appellant,

vs.

Wilmette Park District,
Appellee.

The Clerk will enter our appearances as Counsel for the Appellant.

Theron L. Caudle,
Assistant Attorney General.

Sewall Key,
Special Assistant to the Attorney General.

Endorsed: Filed Feb. 14, 1948. Kenneth J. Carrick, Clerk.

And afterward, to-wit, on the eighteenth day of February, 1948, there was filed in the office of the Clerk of this Court an appearance of counsel for the appellee, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Cause No. 9567.

Wilmette Park District,
Plaintiff-Appellee,

vs.

Nigel D. Campbell, Collector, etc.,
Defendant-Appellant.

The Clerk will enter our appearance as counsel for Appellee.

Henry J. Brandt,
11 S. La Salle St.

Gilbert H. Hennessey, Jr.,
11 S. La Salle St.

Poppenhusen, Johnston, Thompson & Raymond,
11 S. La Salle St.

Endorsed: Filed Feb. 18, 1948. Kenneth J. Carrick, Clerk.

And on the same day, to-wit, on the eighteenth day of February, 1948, there was filed in the office of the Clerk of this Court an appearance of counsel for the appellant, which said appearance is in the words and figures, following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Cause No. 9567.

Feb. 17, 1948.

Wilmette Park District, a Municipal corporation,
Plaintiff-Appellee,

vs.

Nigel D. Campbell, Collector of Internal Revenue,
Defendant-Appellant.

The Clerk will enter their appearance as counsel for Defendant-Appellant.

Otto Kerner, Jr.,
450 U. S. Courthouse,
Chicago,
United States Attorney.

LeRoy R. Krein,
450 U. S. Courthouse,
Chicago,
Asst. United States Attorney.

Endorsed: Filed Feb. 18, 1948. Kenneth J. Carrick, Clerk.

And afterward, to-wit, on the twenty-fourth day of January, 1949, there was filed in the office of the Clerk of this Court an appearance of counsel for the appellant, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Cause No. 9567.

Wilmette Park District,
Plaintiff-Appellee,

vs.

Nigel D. Campbell, Collector of Internal Revenue,
Defendant-Appellant.

The Clerk will enter their appearance as counsel for Defendant-Appellant.

Arthur L. Jacobs,
U. S. Dept of Justice,
Tax Division,
Washington, D. C.

Endorsed: Filed Jan. 24, 1949. Kenneth J. Carrick, Clerk.

And afterward, to-wit, on the twenty-sixth day of Janu-
y, 1949, the following further proceedings were had and
tered of record, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

January 26, 1949.

efore:

Hon. J. Earl Major, Circuit Judge.
Hon. Sherman Minton, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

Wilmette Park District, *Plaintiff-Appellee,* vs. Nigel D. Campbell, Collector of Internal Revenue, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

67

Now this day come the parties by their counsel, and this
use comes on to be heard on the transcript of the record
d the briefs of counsel and on oral argument by Mr.
thur L. Jacobs, counsel for the appellant, and by Mr.
nry J. Brandt, counsel for the appellee, and the Court
es this matter under advisement.

And afterwards, to-wit, on the second day of February, 1949, there was filed in the office of the Clerk of this Court a stipulation re admission tax, which said stipulation is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Wilmette Park District,
Appellee,
vs.
Nigel D. Campbell, Collector of Internal Revenue,
Appellant.
} No. 9567.

STIPULATION.

It is hereby stipulated and agreed by and between the undersigned that the Wilmette Park District did not during the years 1942, 1943, 1944 or 1945 collect from purchasers who paid admissions to its bathing beach facilities any amount to cover the admissions tax alleged to have been imposed by the Admissions Tax Act (53 Stat. 189, as amended, c. 10, Title 26, U. S. C. A., Sec. 1700).

Otto Kerner, Jr.,
L. R. K.
United States Attorney,
Attorney for Appellant.

Henry J. Brandt,
Attorney for Appellee.

Endorsed: Filed Feb. 2, 1949. Kenneth J. Carrick, Clerk.

And afterward, to-wit, on the twenty-third day of February, 1949, there was filed in the office of the Clerk of this Court the opinion of the Court, which said opinion is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 9567. October Term, 1948, January Session, 1949.

Wilmette Park District, *Plaintiff-Appellee,* *vs.* Nigel D. Campbell, Collector of Internal Revenue, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

February 23, 1949.

Before MAJOR, *Chief Judge,* MINTON, *Circuit Judge,* and LINDLEY, *District Judge.*

MAJOR, *Chief Judge.* This is an appeal from a judgment in favor of the plaintiff, entered September 29, 1947, in an action to recover certain taxes theretofore paid to the defendant as the result of an alleged illegal levy and assessment. The taxes involved are referred to as an "admissions tax" and include the years 1942 through 1945.

The findings of fact are predicated in the main upon a stipulation of the parties and are not in dispute. Plaintiff is a body politic and corporate, organized in 1908 under the laws of Illinois. It is administered by a Board of Commissioners elected by the people residing in the district. Plaintiff, a park district, consists of an area of approximately 2.8 square miles located within the incorporated area of the Village of Wilmette, Cook County, Illinois, which village has a population of approximately 20,000. Included within the park district is Washington Park, which extends along the shore of Lake Michigan for approximately

three-fourths of a mile. The land area of this park was acquired partly by grant from the State of Illinois, partly by purchase and partly by the exercise of the right of eminent domain. For many years, a portion of this park adjacent to Lake Michigan has been used as a bathing beach during the summer months.

Plaintiff during the involved years made two types of charges to users of the beach and beach facilities: (1) a flat rate for a season ticket issued on either an individual or family basis, and (2) a single daily admission charge of 50¢ on week days and $1.00 on Saturdays, Sundays and holidays, for which no tickets were issued. Plaintiff supplied for use in conjunction with the bathing beach a bathhouse containing clothing lockers, toilets and washrooms, an automobile parking area, life-saving equipment, flood lighting, drinking fountains, showers, spectator benches, bicycle riding, first-aid personnel and supplies, and it employed in connection with the operation and maintenance of the bathing beach, a beach superintendent, a secretary, beach maintenance labor, life guards, check room and gate check workers, general office workers and policemen. While the beach facilities were utilized principally by the residents of the community, the facilities were available to and were utilized by non-residents.

The charge made by plaintiff for the use of the beach and beach facilities was made to cover maintenance, operation and some capital improvements. Over the years, the charge for the use of the beach and beach facilities was intended merely to approximate these costs and not to produce net income or profit to the plaintiff.

From Gary, Indiana, to Lake Bluff, Illinois, there were twenty-nine municipally operated bathing beaches, some of which did and some of which did not charge admission. From South Chicago to Highland Park, Illinois, there were fifteen bathing beaches located on Lake Michigan operated by private persons for profit, of which nine charged admissions and six were operated by hotels and clubs for the use of their patrons, residents and members, without an express or specific admission charge.

On July 24, 1941, the Collector of Internal Revenue notified plaintiff to collect an admission tax on all bathing beach tickets sold on and after July 25, 1941. This the plaintiff refused to do, and subsequently the United States Commissioner of Internal Revenue assessed and collected from plaintiff the amount of the admissions tax claimed

to be due on the amounts paid as admissions to plaintiff's bathing beach during the years 1942 through 1945. Claims for refund of such amounts were rejected and the instant suit was instituted.

Plaintiff, in support of the judgment, makes two contentions, (1) that the charge which it made to those using its beach was not for admission subject to tax within Sec. 1700 of the Internal Revenue Code, and (2) that the imposition of the tax was unconstitutional and void. The court below agreed with the plaintiff as to its first contention and its decision was predicated on that basis.

Sec. 1700 of the Internal Revenue Code (26 U. S. C. A. 1946 ed.) provides, "There shall be levied, assessed, collected, and paid * * a tax * * of the amount paid for admission to any place, including admission by season ticket or subscription," and that the tax imposed "shall be paid by the person paying for such admission." Sec. 1715 provides, "Every person receiving any payments for admissions * * subject to the tax imposed by section 1700 * * shall collect the amount thereof from the person making such payments," and that the taxes so collected "shall be paid to the collector * * *."

Sec. 101.2 of Treasury Regulation 43 provides, "The tax is imposed on 'the amount paid for admission to any place,' and applies to the amount which must be paid in order to gain admission to a place * *. The term 'admission' means the right or privilege to enter into a place," and Sec. 101.3 of the same Regulation provides, "The tax under section 1700 (a) of the Code is on the amount paid for admission to any place. 'Place' is a word of very broad meaning, and it is not defined or otherwise limited by the Code. But the basic idea it conveys is that of a definite inclosure or location. The phrase 'to any place' therefore, does not narrow the meaning of the word 'admission,' except to the extent that it implies that the admission is to a definite inclosure or location."

Thus it seems clear that the charge which plaintiff makes upon those who enter its bathing beach comes squarely within the statutory definition, as well as that of the Regulation, of the term "admission." Even if it be true, as argued by the plaintiff, that the charge is essentially for the use of the facilities which plaintiff provides, the fact remains that such facilities cannot be utilized until entrance is made and that the latter purpose is accomplished only by payment of the admission charge. Moreover, the person

after entering the place has the option of using the facilities or not as such person sees fit. The court below expressed the view that the charge made by plaintiff was a use rather than an admission tax, but at the same time stated, "If a public beach is operated for profit, the charge for tickets would not be a use tax but an admission within the meaning of section 1700 of the Internal Revenue Code." It was on this basis that the court distinguished *Allen* v. *Regents*, 304 U. S. 439, and it is upon the same basis that plaintiff here attempts to distinguish the *Allen* case and also the decision of this court in *Exmoor Country Club* v. *United States*, 119 F. 2d 961.

In our view, neither of these cases can properly be thus distinguished. Certainly it cannot be contended that the profit element was a critical or determining factor in either. In fact, these cases furnish strong support for the defendant's contention. More than that, we think without the aid of such authorities that plaintiff's contention is not tenable. A holding that the question for decision turns upon the contingency of a profit would lead to an incongruous result. For instance, with two beaches operated side by side in the same manner as plaintiff's beach was operated, one at a loss and the other at a profit, the entrance charge to the former would be characterized as a use tax and the entrance charge to the latter as an admission charge. Under such a theory, the patrons of the former would escape the tax, while those of the latter would be liable. And this arbitrary distinction would arise not only as to beaches, whether publicly or privately operated, but to any other place where a charge was made for entrance and wherein facilities were furnished for the use or enjoyment of those who entered.

While it is not of any great importance, it is pertinent to note that the plaintiff in its complaint relied solely on the unconstitutionality of the tax. The theory that the charge made by the plaintiff was not for admission to its beach and therefore not liable for the tax was apparently evolved during the trial. The court took note of the situation and held, no doubt correctly, that the plaintiff had a right to amend its complaint to conform to the proof. The only point to this situation is that the plaintiff when it filed its complaint evidently did not have any confidence in the theory on which the court decided in its favor. In our view, the court's decision in this respect was erroneous.

The lower court did not decide the constitutional issue involved Plaintiff's contention in this respect, briefly stated, is (1) that its acquisition and maintenance of a bathing beach constitutes the exercise of a governmental function and is immune from federal taxation, (2) that the duty of collecting federal taxes cannot be imposed by Congress upon elected Commissioners of a local governmented body and cannot make the costs of collecting the same a charge upon general tax revenues, and (3) that in view of the fact that the Commissioners did not collect the admission tax from beach patrons, its payment constitutes a burden upon plaintiff's tax revenues. As to points (1) and (2), we think every argument advanced by the plaintiff is answered and controlled by *Allen* v. *Regents, supra.* In that case the court sustained the constitutionality of the federal admissions tax when applied to football games conducted by state collegiate institutions. The state contended, as does the plaintiff here, that the tax is an unconstitutional interference with and burden upon an essential governmental function of the state. The court in rejecting that contention made the following statement equally relevant to the instant situation (page 449):

> "For present purposes we assume the truth of the following propositions put forward by the respondent: That it is a public instrumentality of the state government carrying out a part of the State's program of public education; that public education is a governmental function; that the holding of athletic contests is an integral part of the program of public education conducted by Georgia; that the means by which the State carries out that program are for determination by the state authorities, and their determination is not subject to review by any branch of the federal Government; that a state activity does not cease to be governmental because it produces some income; that the tax is imposed directly on the state activity and directly burdens that activity; that the burden of collecting the tax is placed immediately on a state agency. The petitioner stoutly combats many of these propositions. We have no occasion to pass upon their validity since, even if all are accepted, we think the tax was lawfully imposed and the respondent was obligated to collect, return and pay it to the United States."

Plaintiff makes a feeble effort to distinguish this case, but in our judgment without success. It is claimed in that

case that the venture was operated at a profit and that the payment of the tax as well as the expenses of collection merely reduced the net profits and therefore did not infringe upon the tax revenues of the state. As already noted, we do not understand that decision to depend upon the issue of profit, and we are of the view that immunity from federal taxation cannot be made to rest upon such a variable factor.

It is true the *Allen* case is distinguished on the facts in one respect—that is, there, the state agency (university) issued tickets on which was stated the admission price as well as the amount of the tax, with a notice printed on the ticket to the effect that the state claimed it was not liable for the admission tax and that it would be retained by the state unless its liability for the same was finally determined. As a result, when its liability was thus determined, it had in its treasury the admissions tax which it had collected from patrons available for the purpose of discharging its obligations to the federal government. In contrast, plaintiff's officials refused after notice to collect the tax from its patrons. As a result, it has been compelled to resort to its general funds for the purpose of paying the tax, and we suppose that if plaintiff is not permitted to recover in the instant action, the depletion in its general funds occasioned by payment of the tax therefrom will have to be made up in some manner, presumably by a tax upon all the property of the district.

This represents the basis for the argument in support of point (3) above noted. In our view, this contention is beside the issue. We doubt if anyone would contend that the federal government could impose a tax upon the general revenue of a local government, but that has not been done. The tax was imposed upon those who paid for admission to the beach. The collection of the tax and its payment to the federal government was the only duty imposed upon plaintiff. This its officials refused to do. To permit plaintiff to escape its obligation because its elected officials refused to perform their statutory duty would in effect nullify the statute. Of course, the Commissioners had a right, as argued, to test the constitutionality of the tax, but having done so and lost, we see no reason why their error in judgment should be visited upon the federal government. The question as to where the money to pay the taxes is to be procured may be of concern as between the plaintiff and its Commissioners who refused to obey the statutory mandate,

but in our view it raises no question as between the plaintiff and the federal government.

Much is said in the briefs, especially in plaintiff's brief, relative to the decision in *New York* v. *United States*, 326 U. S. 572, which we find no occasion to discuss.

In our view, the admissions tax is constitutional and was legally imposed and collected by the defendant. It follows that the judgment of refund was erroneous. It is, therefore, reversed and remanded, with directions to enter a judgment favorable to the defendant.

And on the same day, to-wit, on the twenty-third day of February, 1949, the following further proceedings were had and entered of record, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

February 23, 1949.

Before:

Hon. J. Earl Major, Circuit Judge.
Hon. Sherman Minton, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

Wilmette Park District, *Plaintiff-Appellee,* vs. Nigel D. Campbell, Collector of Internal Revenue, *Defendant-Appellant.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

9567

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Reversed, and that this cause be, and the same is hereby, remanded to the said District Court with directions to enter a judgment favorable to the defendant-appellant.

And afterward, to-wit, on the ninth day of March, 1949, there was filed in the office of the Clerk of this Court a petition for rehearing, which said petition is not copied here.

And afterward, to-wit, on the eighteenth day of March, 1949, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

March 18, 1949.

Before:

Hon. J. Earl Major, Circuit Judge.
Hon. Sherman Minton, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

Wilmette Park District, *Plaintiff-Appellee,* vs. Nigel D. Campbell, Collector of Internal Revenue, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

9567

It is ordered by the Court that the petition for rehearing of this cause be, and the same is hereby, denied.

And afterward, to-wit, on the twenty-third day of March, 1949, there was filed in the office of the Clerk of this Court, a motion to stay issuance of the mandate, which said motion is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 9567.

Wilmette Park District,
Plaintiff-Appellee,
vs.
Nigel D. Campbell, Collector of Internal Revenue,
Defendant-Appellant.

On appeal from the United States District Court for the Northern District of Illinois.

MOTION OF WILMETTE PARK DISTRICT, PLAINTIFF-APPELLEE, TO STAY ISSUANCE OF MANDATE.

Now comes Wilmette Park District, Plaintiff-appellee herein, by Henry J. Brandt and Gilbert H. Hennessey, Jr., its attorneys, and respectfully moves the Court as follows:

1. On February 23, 1949, this Court handed down its decision in the above entitled cause. On March 18, 1949, this Court denied Plaintiff-appellee's petition for rehearing of the cause.

2. Pursuant to Rule 25 of this Court, the mandate of this Court will issue as of course within five days from denial of the petition for rehearing.

3. Plaintiff-appellee, Wilmette Park District, respectfully requests this Court to stay the mandate herein pursuant to Rule 25 of this Court for a period of thirty (30) days so that Plaintiff-appellee may file an application for writ of certiorari to the Supreme Court of the United States to review the Court's decision herein.

Respectfully submitted,
Henry J. Brandt,
Gilbert H. Hennessey, Jr.,
Attorneys for Wilmette Park District.

Poppenhusen, Johnston, Thompson & Raymond,
Of Counsel.

Endorsed: Filed Mar. 23, 1949. Kenneth J. Carrick, Clerk.

And on the same day, to-wit, on the twenty-third day of March, 1949, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

March 23, 1949.

Before:

Hon. Otto Kerner, Circuit Judge.

Wilmette Park District, *Plaintiff-Appellee,* *vs.* Nigel D. Campbell, Collector of Internal Revenue, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

9567

On motion of counsel for the Plaintiff-Appellee, it is ordered that the issuance of the mandate of this Court in this cause be, and the same is hereby, stayed pursuant to the provisions of Rule 25 of the Rules of this Court.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of papers filed and proceedings had (excepting motions and orders relating to time for filing of briefs and briefs of counsel) in:

Cause No. 9567.

Wilmette Park District,
Plaintiff-Appellee,

vs.

Nigel D. Campbell, Collector of Internal Revenue,
Defendant-Appellant,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 19th day of April, A. D. 1949.

(Seal)

Kenneth J. Carrick,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 20, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. [redacted] 75 of 49

No. [redacted] 75

WILMETTE PARK DISTRICT,

Petitioner

vs.

NIGEL D. CAMPBELL, COLLECTOR OF INTERNAL REVENUE,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

HENRY J. BRANDT,
GILBERT H. HENNESSEY, JR.,
Attorneys for Petitioner.

E. R. JOHNSTON
POPPENHUSEN, JOHNSTON, THOMPSON & RAYMOND,
Of Counsel.

Chicago, Illinois.

THE BLAKELY-HARRIS PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

INDEX.

CITATIONS.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. .....

WILMETTE PARK DISTRICT,

Petitioner

vs.

NIGEL D. CAMPBELL, COLLECTOR OF INTERNAL REVENUE,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Wilmette Park District, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled cause on February 23, 1949, reversing the judgment of the District Court for the Northern District of Illinois.

OPINIONS BELOW.

The opinion of the District Court (R. 25-27; 41-44) is reported at 76 F. Supp. 924. The opinion of the Court of Appeals (R. 63-69) is reported at 172 F. (2d) 885.

JURISDICTION.

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on February 23, 1949. Rehearing was denied on March 18, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254, 2101.

QUESTIONS PRESENTED.

1. Whether the Federal Government has the constitutional power to burden a local government by taxing its citizens' right to use park facilities which are provided for their benefit at less than cost.

2. Whether the Federal Government may constitutionally enforce collection of a penalty against another sovereign by seizure of the general funds of that sovereign raised by taxation.

3. Whether the Admissions Tax Statute, 26 U. S. C. 1700, should be construed to require the payment of a Federal tax on a charge made by a local government for the use of park facilities operated for the public benefit and not for profit.

ONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

United States Constitution, Amendment X:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Internal Revenue Code:

Sec. 1700. Tax.

There shall be levied, assessed, collected, and paid—

(a) *Single or Season Ticket; Subscription.*—

(1) *Rate.*—A tax of 1 cent for each 10 cents or fraction thereof of the amount paid for admission to any place, including admission by season ticket or subscription.

[This rate was increased to "1 cent for each 5 cents or major fraction thereof" by Section 210 of the Revenue Act of 1940, c. 419, 54 Stat. 516.]

(2) *By whom paid.*—The tax imposed under paragraph (1) shall be paid by the person paying for such admission.

Sec. 1704. Admission Defined.

The term "admission" as used in this chapter includes seats and tables, reserved or otherwise and other similar accommodations, and the charges made therefor.

Sec. 1718. Penalties. • • •

(c) Any person who willfully fails to pay, collect, or truthfully account for and pay over, any tax imposed by this chapter, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty of the amount of the tax evaded, or not paid, collected, or accounted for and paid over, to be assessed and collected in the same manner as taxes are assessed and collected.

STATEMENT.

Petitioner, a body politic and corporate, organized in 1908 under the provisions of appropriate Illinois statutes,[1] has jurisdiction of four public parks within the Village of Wilmette (R. 41-42). The north end of Washington Park, which fronts on Lake Michigan, has been operated by petitioner as a public bathing beach for over 25 years (R. 42). The facilities supplied by petitioner in connection with this beach include a bathhouse, showers, toilets, washrooms, an automobile parking area, lifesaving equipment, floodlights, drinking fountains, and first aid personnel and supplies (R. 42). Maintenance men, lifeguards, clerical assistants, check room attendants, and policemen, are employed by the Park District for work at the beach (R. 42).

In order partially to defray the cost of maintenance and operation of the beach, petitioner charged a fee to "users of the beach and beach facilities" (R. 42-43). This fee was collected through the sale of tickets of various kinds. In 1943, for example, a family ticket priced at $4.00 entitled the purchaser and the members of his family to "Beach and Beach House Privileges" (R. 14 (a)). A higher price was charged if the privileges included automobile parking space (R. 14 (a)). Tickets were also sold on an individual season basis and also on a daily fee basis (R. 42). The trial court found that:

> "The charge made by the Park District for use of the beach and beach facilities is made to cover maintenance, operation, and some capital improvements. Over the years the charge for the use of the beach and beach facilities is intended merely to approximate these costs, and not to produce net income or profit to the Park District" (R. 42-43).

1. Ill. Rev. Stat. (1945) c. 105, §§ 256-295.

As a matter of fact, the revenue from the fees has regularly been insufficient to meet current expenses, and it has been necessary to draw upon the general funds of petitioner in order to operate the beach (R. 14 (b)). These general funds are raised by levying taxes on the owners of real property located in the Park District (R. 19).

The tickets sold by petitioner to users of the beach and beach facilities have never carried any statement indicating that a part of the purchase price represented a tax due to the United States. No "admissions" tax has ever been collected from users of the beach and no part of the proceeds of the sale of tickets has ever been set aside to provide for payment of such a tax (R. 62).

On July 24, 1941, petitioner was notified by the Collector of Internal Revenue to collect an admissions tax on all beach tickets sold thereafter (R. 43). Petitioner refused to comply with this notice. Subsequently, and on three separate occasions, the Collector, acting under the supposed authority of the Penalties Section, 26 U. S. C. 1718, levied penalties against petitioner in the amount (plus interest) which the Collector claimed petitioner should have collected from the users of its beach facilities (R. 43-44). These penalties, aggregating $6,139.93, were enforced by means of distraint levies against the general funds of petitioner, and were paid under protest out of these funds. As stated above, these general funds were derived from tax revenues.

Claims for refunds were filed and rejected, and petitioner brought this action to recover the penalties illegally collected by respondent (R. 43-44).

The District Court held that petitioner's charge for the use of the beach and its facilities was not an admission charge within the meaning of Section 1700 of the Internal Revenue Code, thus avoiding the constitutional questions.

The Court of Appeals, giving the words of Section 1700

their literal dictionary meaning, held that petitioner was required to collect an admissions tax from the users of its beach facilities. The Court further held that petitioner's constitutional arguments were foreclosed by *Allen* v. *Regents*, 304 U. S. 439 (1938).

REASONS FOR GRANTING THE WRIT.

I.

IN HOLDING THAT CONGRESS HAS THE CONSTITUTIONAL POWER TO TAX A CITIZEN'S RIGHT TO USE PUBLIC PARK FACILITIES PROVIDED FOR HIS BENEFIT AND NOT FOR THE PURPOSE OF MAKING A PROFIT, THE COURT OF APPEALS ERRED IN DECIDING A QUESTION OF GENERAL IMPORTANCE AND FAILED TO GIVE PROPER EFFECT TO APPLICABLE DECISIONS OF THIS COURT.

The imposition of the admissions tax on the charge for use of petitioner's beach is an unconstitutional burden on a State activity which is immune from Federal taxation. By increasing the price of the tickets, and thus reducing the number of persons who can afford them, the tax unquestionably cuts into the revenues which are used to defray the cost of maintaining these park facilities. But what is more important, the tax reduces the ability of members of the community to use the park facilities which are provided for their benefit. The tax tends to deny access to the beach to some members of the community—those who could not afford to purchase the extremely valuable lake front property in the Wilmette area. This tendency of course varies with the tax rate, and also with the type of community involved, but its effect is directly opposed to the policy of the local government to minister to the health and recreational needs of its citizens. The direct interference with this policy is a burden on the local government.

And, because of the nature of the activity involved, it is an unconstitutional burden. Though the various opinions in *New York* v. *United States*, 326 U. S. 572 (1946) define the scope of State immunity from Federal taxation some-

what differently, all three opinions dealing with the constitutional problem[2] support petitioner's claim of immunity.

A.

Mr. Justice Frankfurter indicated that immunity should be allowed to "State activities and State-owned property that partake of uniqueness from the point of view of intergovernmental relations" (p. 582). As illustrative of such activities, he referred to State ownership of a State house and State income derived from taxation. Petitioner contends that this classification, which apparently includes activities which are unique simply because they are State activities, includes the maintenance of public parks.

Public hospitals, public schools, and public parks have their counterparts in private hospitals, schools, and country clubs; but from the point of view of intergovernmental relations, the activities are crucially different when State-owned. Thus if the Federal government imposes high admissions taxes on private health or educational institutions, the effect is only to limit access to such private institutions to a wealthy minority. But if the Federal Government should tax admission to public hospitals or admission to public schools, it would interfere with a function which a State is under a duty to perform for its citizens. It is no answer to say that the State would not be harmed so long as the admissions tax was levied on persons seeking admission to the schools or hospitals and not on the State institution itself. The State is injured to the extent that the tax creates a barrier between the citizen and the benefit which the State has undertaken to supply.

Police protection, fire protection, education, and health

2. The opinion of Mr. Justice Rutledge dealt only with the problem of statutory construction. As stated below, his reasoning is clearly applicable here.

are functions which a local government has a duty to perform for its citizens. From the point of view of intergovernmental relations, its citizens have a right to receive these benefits without having them burdened with Federal taxes. This is true even though similar services performed privately would be subject to taxation, because these services "partake of uniqueness" when performed by the local government as a public service for the whole community.

The maintenance of a public park is clearly this type of activity. See *Commissioner* v. *Sherman*, 69 F. (2d) 755, 759, and authorities cited (C. A. 1st, 1934). Commons, squares, and other open places designed to promote public relaxation, health, and recreation have been known in English-speaking communities for centuries. These parks are always maintained at public expense and for the benefit of the public. If a local government chooses to defray some of the cost of maintenance of a park by charging a fee to the users of its facilities, the essential nature of the activity is not changed. So long as the park is not run as a commercial enterprise for the purpose of making a profit, cf. *Chimney Rock Co.* v. *United States*, 63 Ct. Cl. 660 (1927), or is not just a private club as contrasted with a park maintained by the local government for the benefit of the general public, cf. *Exmoor Country Club* v. *United States*, 119 F. (2d) 961 (C. A. 7th, 1941), the conditions on which the local residents may enjoy the benefits of the program should be defined by the local government and not by another sovereign.

In constitutional terms the argument is the same whether the Federal Government taxes admission to public schools, admission to public hospitals, admission to the practice of law or medicine, or admission to a public golf course or bathing beach. It is true that in some of these examples the admission is not into an enclosed area of the type described by the literal wording of the admissions tax statute. But the constitutionality of the tax does not depend on

the presence or absence of a physical enclosure. The constitutional issue turns on the character of the governmental service being performed. The Federal Government has no greater power to deny a local citizen his right to enter a local park or to impair that right by taxation than it has to interfere with a right granted and defined by the State to receive medical or educational benefits.[3]

B.

The opinion of Chief Justice Stone in *New York* v. *United States*, 326 U. S. 572, 586 (1946), though taking a different approach than Mr. Justice Frankfurter to the problem of State immunity, also requires reversal of the court below. The question for the members of the Court who joined Chief Justice Stone is whether a Federal tax, even though it is not discriminatory "may nevertheless so affect the State, merely because it is a State that is being taxed, as to interfere unduly with the State's performance of its sovereign functions of government" (p. 587).

In the *New York* case, Chief Justice Stone could appropriately say that the tax on the business of selling mineral waters "does not bear on the State any differently than on the citizen" (p. 589). Similarly a tax on the sale of sand from petitioner's beach would not bear any differently on petitioner than on any other businessman, and therefore would not interfere with a sovereign function of government. But it cannot be said that the maintenance of public parks is such an activity "that its taxation does not unduly impair the State's functions of government" (p. 589). Even though the tax on a public park may super-

3. This is not to say that the Federal Government may not increase the local benefits. For example, the United States may offer financial aid to State schools on condition that they provide equal educational opportunities for all. That is, it may *assist* the local residents in gaining access to schools. But it has no constitutional power to *deny* State citizens access to State schools.

ficially resemble a tax on an exclusive country club, from the point of view of impairment of the state's functions of government the two taxes are essentially different. Only the former interferes with the local government's function of providing park facilities for the benefit of the general public. It is well settled "that the creation and maintenance of public parks is a governmental function of a state and its exercise is essential to the health and general welfare of all the citizens of a state." *Commissioner* v. *Sherman*, 69 F. (2d) 755, 759 (C. A. 1st, 1934).

Again, from the point of view of removing sources of revenue for the Federal Government, Chief Justice Stone's opinion points up the difference between the *New York* case and this case. As he there pointed out, "The national taxing power would be unduly curtailed if the State, by extending its activities, could withdraw from it subjects of taxation traditionally within it" (p. 589). Such businesses as selling hard liquor, see *South Carolina* v. *United States*, 199 U. S. 437 (1905), or mineral water have been traditionally subject to federal taxation. In contrast, the maintenance of public parks, golf courses, or other recreational facilities have never been taxed by the federal government. Chief Justice Stone clearly regarded the maintenance of public parks as an immune activity:

> "A State may, like a private individual, own real property and receive income. But in view of our former decisions we could hardly say that a general nondiscriminatory real estate tax (apportioned), or an income tax laid upon citizens and States alike could be constitutionally applied to the State's capitol, its State-house, its public school houses, *public parks*, or its revenues from taxes or school lands, even though all real property and all income on the citizen is taxed." 326 U. S. at 587-588. (Emphasis added.)

The question here is not whether the State may withdraw a business from the field of Federal taxation, but

rather whether the Court will permit an unprecedented expansion of the Federal field to include the traditionally immune non-commercial activity of maintaining public parks.

In view of the fact that this tax tends to frustrate petitioner's policy of providing park facilities for its citizens at minimum cost, there can be no doubt that it burdens petitioner in a manner prohibited by the reasoning of all the various opinions in the *New York* case, including the dissenting opinion of Mr. Justice Douglas.

C.

The holding of this Court in *Allen* v. *Regents*, 304 U. S. 439 (1938) that admission fees paid by spectators of State University football games are subject to the tax supports, rather than forecloses, petitioner's argument. Three characteristics of the charges made for the use of petitioner's beach distinguish them from charges for admission to athletic spectacles. First, the activities themselves—part of the public park programs maintained by the local governments for the benefit of their citizens—have traditionally been exempt from Federal taxation. Second, the fees are paid by the members of the community who are the intended beneficiaries of the governmental activity. And third, these charges are not calculated to make a profit, but merely to defray the cost of maintaining the public beach.

None of these three characteristics was present in the *Allen* v. *Regents* situation. First, the opinion in that case specifically describes college football as "a business comparable in all essentials to those usually conducted by private owners"; the State embarked "in a business which would normally be taxable"; it elected to raise funds to support a governmental activity "by conducting a busi-

ness" (304 U. S. 439, 451-452). That commercial activity did not itself become governmental merely because the profits were used to support governmental activities. Secondly, the fees which were there held subject to the admissions tax were paid by the general public, rather than the direct beneficiaries of the Georgia educational program. The tax was not imposed on the privilege of receiving education from the State;[4] it therefore did not create any barrier between the citizens and the benefit which Georgia had undertaken to supply. The tendency of the tax to exclude part of the general public from the games is not such a barrier because spectators do not go to football games for the purpose of getting an education. Thirdly, the football admission charges were calculated to make a substantial profit.[5] College football can be appropriately characterized as a "business enterprise conducted by the State for gain."[6]

The difference between this case and *Allen* v. *Regents* may be illustrated by two examples. If petitioner operated a motion picture theatre, or more precisely a professional athletic spectacle, in downtown Wilmette, and used the profits from that business to maintain the beach, the situation would fall squarely within the language of the *Allen* opinion:

"In final analysis the question we must decide is

4. In fact, the Georgia students were not even required to pay a tax on their admissions. See 304 U. S. 430, 450.

5. "'The important fact is that the State, *in order to raise funds* for public purposes, *has embarked in a business having* the incidents of similar enterprises usually prosecuted for private gain. If it be conceded that the education of its prospective citizens is an essential governmental function of Georgia, as necessary to the preservation of the State as is the maintenance of its executive, legislative, and judicial branches, it does not follow that if the State elects to provide the funds for any of these purposes *by conducting a business*, the application of the avails in aid of necessary governmental functions withdraws the business from the field of federal taxation." 304 U. S. 439, 452. (Emphasis added.)

6. 304 U. S. 439, 453.

whether, by electing to support a governmental activity through the conduct of *a business comparable in all essentials to those usually conducted by private owners,* a State may withdraw the business from the field of federal taxation.

"When a State *embarks in a business which would normally be taxable,* the fact that in so doing, it is exercising a governmental power does not render the activity immune from federal taxation." (Emphasis added.) 304 U. S. 439, 451.

But this language, which is the heart of the opinion, clearly does not apply to this case. The maintenance of public parks is an essential function of local government, historically and properly free from taxation by the Federal Government. Petitioner is not attempting to withdraw any business from the field of Federal taxation. On the contrary, respondent is trying to expand that field to include public parks even though they are non-commercial governmental activities, run not for profit but for the benefit of the general public. Such activities have never been burdened by taxation.

The second example which points up the difference between this case and *Allen* v. *Regents* would be an attempt by the Federal Government to levy a tax on the fees charged by a State school for tuition or for participation in a student athletic program. Such a tax would clearly be unconstitutional; there is no more justification for the tax involved here.

II.

IN HOLDING THAT THE FEDERAL GOVERNMENT MAY ENFORCE COLLECTION OF A TAX OUT OF THE GENERAL FUNDS OF A LOCAL GOVERNMENT, THE COURT OF APPEALS DECIDED A CONSTITUTIONAL QUESTION OF GENERAL IMPORTANCE WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

Petitioner did not, in fact, collect any tax in connection with the sale of its tickets, nor did it make any profits from the operation of the beach. Consequently if petitioner is to be held liable for the penalties which respondent seeks to impose, these penalties must be paid out of petitioner's general funds which are derived from taxation of property located in the Wilmette Park District.

The Federal Government has no power to infringe the sovereignty of a local government by imposing a penalty which can only be paid out of its general funds. Assuming the duty of petitioner to pay the tax, or to satisfy a judgment for a tort, nevertheless such a duty cannot be enforced by a sheriff's levy, or by the collector's distraint levy, on petitioner's general funds any more than it can be enforced by a levy on a school house, a county hospital, or a court-house. One of the attributes of sovereignty is immunity from such process. The sovereign cannot be compelled by force to pay debts. Nor, if we are to be protected "from clashing sovereignty", see *M'Culloch v. Maryland*, 4 Wheat. 316, 429 (1819), can one sovereign have any greater power to punish another sovereign or to seize its property than any ordinary citizen has. The delicate nature of the relationship between the federal Union and the sovereign States comprising it requires the Federal Government to pay an even more exacting respect to this attribute of sovereignty. Cf. *Kentucky* v. *Dennison*, 24 How. 66 (1861); *Luther* v. *Borden*, 7 How. 1 (1849); *Coleman* v. *Miller*, 307 U. S. 433 (1939).

III.

IN HOLDING THAT CONGRESS INTENDED THE ADMISSIONS TAX TO APPLY TO CHARGES FOR USE OF PUBLIC BEACH FACILITIES, THE COURT OF APPEALS ERRED IN DECIDING A QUESTION OF GENERAL IMPORTANCE WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A.

The question of statutory construction is whether the charge made for the use of petitioner's beach is an "amount paid for admission to any place" within the meaning of this particular statute. The question cannot be answered by a purely literal construction of the statute. For there are many charges which fall within the literal wording but are not taxed because it is clear that Congress did not intend them to be taxed. The charge for the use of petitioner's park facilities is such a charge.

The history of the Admissions Tax Statute demonstrates the primary intent of Congress to tax admissions paid for the privilege of entering places of entertainment. In the statute's English antecedent "the expression 'admission' means admission as a spectator or one of an audience." *Attorney General* v. *Southport Corp.*, [1934] 1 K. B. 226, 236. The only "definition" of the term "admission" in the American statute states that the tax shall apply to charges for the use of "seats and tables, reserved or otherwise and other similar accommodations". 26 U. S. C. 1704. This provision, which is designed to treat "cover charges" in night clubs and similar places of entertainment as "admissions", characterizes the tax as one generally on entertainment. Though "cover charges" are literally charges for the use of chairs and tables, the statute treats them as admission charges. By specifically including these and no other use charges as admissions, Congress clearly indicated that other charges for the use of facilities were not intended to be covered.

Just as use charges which are not literally admissions are taxed, so are there many charges which are literally for admission to a place but which are not taxed because they are essentially use charges. For example, no tax is imposed on greens fees charged for admission to and use of golf courses. S. T. 357, I-1 C. B. 434. It is unreasonable to assume that Congress intended to discriminate between users of public beaches and users of public golf courses and similar public park facilities.

Similar examples are legion. The Chicago Park District maintains a parking area in Grant Park. Upon payment of an admission charge of 50¢, the driver of any automobile may enter the enclosure and remain for ten minutes or 24 hours—just as a purchaser of a daily beach ticket may use petitioner's beach facilities for ten minutes or all day. Although the 50¢ is literally an "amount paid for admission to any place", no admissions tax is levied on this fee.

Many state and local governments operate toll roads and toll bridges. Charges for the entrance upon and use of such roads as the Pennsylvania Turnpike are not taxed though they fall squarely within the literal meaning of "amount paid for admission to any place." See Note (1948) 42 Ill. L. Rev. 818, 821 n. 25.

Charges for the use of tennis courts, charges for the use of public ice skating facilities, charges for the entry into and use of transportation facilities, charges for entering parking lots,—all are literally within the statute, yet none are taxed.

Unquestionably subject to the admissions tax are charges for entrance into theaters, movies, concerts, lectures, dances, resorts, and athletic exhibitions of all kinds. These activities are usually conducted for profit; they all involve entertainment by listening or seeing, or by both.

But charges for the entry into and use of parking lots, toll roads, tennis courts, golf courses, and transportation facilities, which are not taxed, are of a different kind. The charges made for the use of these facilities, at least when they are run by a local government, are generally not calculated to make a profit, but instead are merely intended to place a part of the burden of supporting the activity on those who benefit from it. These activities involve the active use of facilities, and not merely the observation of spectacles.

The charge for the use of beach facilities clearly falls into the use charge category. It cannot be distinguished from the "greens fee" charge. Payment of the fee admits the golfer or swimmer to the area, and gives him the right to use the sporting facilities. In neither case is a spectacle witnessed, or is entertainment provided. The beach, like the tennis court and golf course, is not subject to this tax.

B.

In framing the Admission Tax Statute in general terms, Congress expressed no purpose to impose a tax on the privilege of enjoying public park facilities. At the time this broad language was chosen, Congress could not have had any idea that it might be applied to an essential activity of government such as this. If the Congress had intended to tax this type of state function, it would have said so explicitly. This point is clearly stated by Mr. Justice Rutledge in his concurring opinion in *New York* v. *United States*, 326 U. S. 572, 585 (1946):

> "With the passing of the former broad immunity, I should think two considerations well might be taken to require that, before a federal tax can be applied to activities carried on directly by the states, the intention of Congress to tax them should be stated expressly and not drawn merely from general wording

of the statute applicable ordinarily to private sources of revenue. One of these is simply a reflection of the old immunity, in the presence of which, of course, it would be inconceivable that general wording, such as the statute now in question contains, could be taken as intended to apply to the states.[1] The other is that, quite apart from reflections of that immunity, I should expect that Congress would say so explicitly, were its purpose actually to include state functions, where the legal incidence of the tax falls upon the state.[2]

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1. To give removal of the immunity the effect of inverting the intention of Congress, in its later use of the same formula, is a leap in construction longer than seems reasonable to make.

2. Cf. 26 U. S. C. § 22(a) where Congress has specifically provided that compensation for personal service, includible in gross income, includes compensation for personal service as an officer or employee of a state, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing."

The general language of the Admissions Tax Statute evinces no Congressional purpose to tax the use of public park facilities. In fact, the available evidence points to a contrary intent. Treasury Regulations have recognized a distinction between tickets which entitle one to use facilities only on particular occasions, whether for a whole series of performances or for only one performance, and those which confer the right of unlimited entry during a particular period.[7] When sold by private clubs, the former

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7. "An amount paid to become regularly entitled to the privileges of a club or other organization, as member or otherwise, is not an 'amount paid for admission' even though one of the privileges be the right to enter a clubhouse, club grounds, gymnasium, swimming pool, or the like * * *" Reg. 43 (1949), Sec. 101.2.

The price of the season ticket is paid to entitle the ticket holder regularly to go upon the beach. The regulation continues: "But where the chief or sole privilege of a so-called membership is a right of admission to certain particular performances or to some place on a definite number of occasions (*as contrasted with a more*

category is subject to the admissions tax, and the latter to the dues tax. Since the dues tax obviously does not apply to public park facilities, it would seem to follow that petitioner's season tickets, which grant a "more or less unlimited right to enter" the beach during the summer, would be tax free and that only the daily tickets would be subject to the admissions tax. But respondent could not ask for such an incongruous result because it is clear that Congress intended the two taxes to complement one another and to apply generally to the same types of activities. Therefore, to avoid inconsistency, respondent seeks to expand the scope of the admissions tax in order to treat public parks like private clubs. But is not the opposite result a fairer interpretation of Congressional intent? Congress distinguished between private clubs and public beaches for dues tax purposes; therefore it seems reasonable to assume that the same distinction was intended for admissions tax purposes. Congress did not intend to tax the use of public park facilities. The failure to apply the dues tax to the seasonal use of petitioner's park represents a consistent legislative policy only if the principle of statutory construction stated by Mr. Justice Rutledge is applied here. The general language of this statute, which was first drawn when Congress must have assumed public parks to be exempt from Federal taxation, is no evidence of intent to impose this tax on petitioner.

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or less unlimited right to enter a clubhouse or other place as many times as desired during a year or some other period), then the amount so paid for such so-called membership is an 'amount paid for admission' * * *" [Emphasis added.]

A season ticket entitles its holder to unlimited entry onto and use of the beach as many times as desired during the season, the category not subject to this tax. This regulation clearly has the effect of exempting petitioner's season tickets from the admissions tax.

C.

Finally, the Court should adopt the construction of the statute which will avoid the constitutional questions. "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell* v. *Benson*, 285 U. S. 22, 62. *Ashwander* v. *Valley Authority*, 297 U. S. 288, Brandeis, J. concurring at 348; cf. *United States* v. *Congress of Industrial Organizations*, 335 U. S. 106 (1948). By adopting a reasonable construction of the statute, the District Court recognized its duty in this regard. The Court of Appeals, however, ignored this "cardinal principle" of statutory construction.

Conclusion.

This case is of great importance to local governments throughout the country. In the Chicago area alone, between Gary, Indiana, and Lake Bluff, Illinois, there are 29 municipally operated bathing beaches (R. 43). Comparable park facilities must number in the thousands since the ruling in this case affects many types of sports activities—golf, tennis, skating, bathing, and any others that may be carried on only within a defined area. The constitutional issue cuts across the whole scope of local governmental functions. The case warrants the careful consideration of this Court.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

HENRY J. BRANDT,
E. R. JOHNSTON GILBERT H. HENNESSEY, JR.,
Attorneys for Petitioner.

POPPENHUSEN, JOHNSTON, THOMPSON & RAYMOND,
Chicago, Illinois,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. 75

WILMETTE PARK DISTRICT,
Petitioner

vs.

NIGEL D. CAMPBELL, COLLECTOR OF INTERNAL REVENUE,
Respondent

BRIEF OF PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

HENRY J. BRANDT,
GILBERT H. HENNESSEY, JR.,
ROBERT F. FUCHS,
Attorneys for Petitioner.

POPPENHUSEN, JOHNSTON, THOMPSON & RAYMOND,
Of Counsel.

Chicago, Illinois.

THE BLAKELY-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

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OPINIONS BELOW.

The opinion of the District Court (R. 25-27; 41-44) is reported in 76 F. Supp. 924, and the opinion of the Court of Appeals (R. 63-69) is reported in 172 F. 2d 885.

JURISDICTION.

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on February 23, 1949 (R. 69), and a petition for rehearing was denied on March 18, 1949 (R. 70). The petition for a writ of certiorari was filed on May 18, 1949 and was granted on June 20, 1949 (R. 73). The jurisdiction of this Court is invoked under 28 U. S. C. 1254, 2101.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

United States Constitution, Amendment X:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Internal Revenue Code:

§ 1700. Tax

There shall be levied, assessed, collected, and paid—

(a) Single or season ticket; subscription—(1) Rate. A tax of 1 cent for each 10 cents or fraction thereof of the amount paid for admission to any place, including admission by season ticket or subscription * * *. 40 STAT. 319 (1917).

(This rate was increased to "1 cent for each 5 cents or major fraction thereof" by Section 302 of the Revenue Act of 1943, c. 63, 58 Stat. 21.)

§ 1701. Exemptions from tax

No tax shall be levied under this subchapter in respect of—

(a) Religious, educational, or charitable entertainments. Except in the case of admissions to any athletic game or exhibition the proceeds of which inure wholly or partly to the benefit of any college or university (including any academy of the military or naval forces of the United States), any admissions all the proceeds of which inure (1) exclusively to the benefit of religious, educational, or charitable institutions, societies, or organizations, societies for the prevention of cruelty to children or animals, or societies or organizations conducted for the sole purpose of maintaining symphony orchestras and receiving substantial support from voluntary contributions, or of improving any city, town, village, or other municipality, or of maintaining

a cooperative or community center moving-picture theater * * * if such admissions are not to wrestling matches, prize fights, or boxing, sparring, or other pugilistic matches or exhibitions and no part of the net earnings thereof inures to the benefit of any private stockholder or individual; or (2) exclusively to the benefit of persons in the military or naval forces of the United States; or (3) exclusively to the benefit of persons who have served in such forces and are in need; or (4) exclusively to the benefit of National guard organizations, Reserve Officers' associations or organizations, posts or organizations of war veterans, or auxiliary units or societies of any such posts or organization, if such posts, organizations, units or societies are organized in the United States or any of its possessions, and if no part of their net earnings inures to the benefit of any private stockholder or individual; or (5) exclusively to the benefit of members of the police or fire department of any city, town, village, or other municipality, or the dependents or heirs of such members. * * * 44 STAT. 92, *as amended*, 47 STAT. 271, 26 U. S. C. 1701 (1940). (This provision was substantially repealed on Sept. 20, 1941. 55 STAT. 710.)

§ 1704. Admission defined

The term "admission" as used in this chapter includes seats and tables, reserved or otherwise and other similar accommodations, and the charges made therefor. 40 STAT. 300, 319 (1917), *as amended*, 53 STAT. 191 (1939). (26 U. S. C. 1946 ed., § 1704.)

§ 1718. Penalties * * *

(c) Any person who willfully fails to pay, collect, or truthfully account for and pay over, any tax imposed by this chapter, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty of the amount of the tax evaded, or not paid, collected, or accounted for and paid over, to be assessed and collected in the same manner as taxes are assessed and collected * * * (26 U. S. C. 1946 ed., § 1718).

QUESTIONS PRESENTED.

1. Whether the Federal Admissions Tax Statute, 26 U. S. C. 1700, should be construed to require the payment of a federal tax on a charge made by a local government for the use of park facilities operated for the public benefit and not for profit.

2. Whether the federal government has the constitutional power to burden a local government by taxing its citizens' right to use park facilities which are provided for their benefit at less than cost.

3. Whether the federal government may constitutionally enforce collection of a penalty against another sovereign by seizure of the latter's general funds.

STATEMENT.

Petitioner is a body politic and corporate organized in 1908 under the provisions of an Illinois statute enacted in 1895. Ill. Rev. Stat. (1945) c. 105, Secs. 256-295 (R. 41). It is administered by a Board of Commissioners elected by residents of the district (R. 41). Four public parks fall under the Board's jurisdiction (R. 12, 51). The northern portion of Washington Park, the largest of the four, fronts on Lake Michigan and extends along the lake shore for approximately three-fourths of a mile (R. 42). Petitioner acquired jurisdiction over three hundred feet of the shoal waters off Washington Park by grant of the Illinois General Assembly (1895, June 24, Laws 1895, p. 272, § 19; Chap. 105, § 273, Ill. Rev. Stat. 1941). The Washington Park land area was obtained in part by grant from the State of Illinois and in part by condemnation and purchase (R. 42). For more than twenty-five years the riparian portion of this park area has been used in conjunction with the shoal waters as a bathing beach (R. 42). The authority for the operation of this beach is granted by the same statutory provisions which authorize petitioner to conduct the other familiar recreational facilities found in Washington Park (Chap. 105, Sec. 11-5, Ill. Rev. Stat. 1947). Petitioner's beach is one of twenty-nine municipal beaches operated on the shores of Lake Michigan between Gary, Indiana and Lake Bluff, Illinois (R. 43). In connection with it, petitioner supplies various facilities including a bathhouse, showers, toilets, life saving equipment, and an automobile parking area (R. 42). Petitioner also employs such personnel as are necessary to operate and to police these facilities (R. 42).

Like some of the other beaches operated by park systems in the Chicago area, petitioner makes a charge for the privilege of using the beach and its facilities (R. 42). The charges are collected through the sale of tickets of various kinds. In 1943 a $1.50 ticket entitled one person to use the "beach and bathhouse privileges" throughout the season (R. 14 (a)). A $4.00 ticket authorized an entire family to use such facilities during the 1943 season (R. 14 (a)). If the family also wanted the privilege of entering and making use of automobile parking space, the ticket price was 50% higher (R. 14 (a)). Tickets were also sold on a daily fee basis (R. 42).

The trial court found that these charges were intended to be merely compensatory. It stated:

> "The charge made by the Park District for use of the beach and beach facilities is made to cover maintenance, operation, and some capital improvements. Over the years the charge for the use of the beach and beach facilities is intended merely to approximate these costs, and not to produce net income or profit to the Park District." (R. 42-43.)

In fact the revenue obtained from these charges has been insufficient to meet current expenses. As a result petitioner has found it necessary to draw upon its general funds in order to maintain the beach (R. 14 (b)). These general funds are raised by taxation on real property (R. 19).

On July 24, 1941 the Collector of Internal Revenue directed petitioner to collect from the users of its beach a federal admissions tax on all beach tickets sold thereafter (R. 43). Petitioner did not comply with this order nor has it ever set aside any part of the beach revenues for the payment of any tax or penalty imposed by the federal government (R. 62). Subsequently the Commissioner of Internal Revenue assessed and collected from petitioner, under the supposed authority of the penalty section of the

Internal Revenue Code, 26 U. S. C. 1718, penalties in an amount equal to that which it was asserted should have been collected (R. 43-44). Because the Collector threatened to make a distraint levy on its bank account if it did not do so, petitioner was compelled to pay these sums out of its general funds (R. 18). After refund claims for the years 1941 to 1945, inclusive, had been rejected, petitioner instituted this action against the Collector in the United States District Court for the Northern District of Illinois (R. 43-44).

The District Court held that the compensatory fees charged for the privilege of using petitioner's beach were not admissions within the meaning of the Federal Admission Tax Statute, and therefore that respondent had no authority to collect penalties from petitioner (R. 25-27; 44-45). The United States Court of Appeals for the Seventh Circuit reversed (R. 63-69).

SPECIFICATION OF ERRORS TO BE URGED.

1. The Court below erred in failing to decide in favor of petitioner the questions enumerated in the Questions Presented.

SUMMARY OF ARGUMENT.

I.

This Court has recently held that if a statute's literal reading leads to an unreasonable result it will not be adopted. The documented purpose of Congress in enacting the admissions and dues tax statutes as part of a wartime tax program was to tax the luxury of patronizing commercial entertainment establishments. The administrative interpretation of the statute, insofar as it is consistent, supports this conclusion. Moreover, other provisions of the act make it obvious that Congress never intended to levy any tax on fees paid for the use of municipal park facilities.

This Court should not disregard convincing evidence of Congressional intent merely because it is possible to raise difficult constitutional questions under a permissible, though unreasonable literal reading of the statute.

II.

A. Certain State activities which are peculiarly suited to performance by a local sovereign are immune from taxation by the Federal Government. The maintenance of a public park, and as an incident thereto a bathing beach, is such an activity.

B. The character of an immune activity is not affected by the fact that private agencies perform a similar function for profit.

C. A Federal tax which is added to the compensatory fee charged to the beneficiaries of the immune functions directly burdens the local sovereign because it tends to frustrate that government's policy of performing an essential service for its citizens at a minimum cost to them.

D. The National Government does not acquire the right to burden an immune activity with taxation merely because the local sovereign raises money for its maintenance by charging a compensatory fee to the beneficiaries of the activity.

E. Recognition of the immunity heretofore enjoyed by petitioner and other local sovereigns comparably situated will withdraw no revenue from the field of Federal taxation. But the addition of this area to the taxable field will unconstitutionally impair the sovereignty of local governments.

F. Power to punish the Sovereign States was never granted by them to the Federal Government.

I.

The Statutory Question.

The admissions tax statute imposes a twenty per cent levy on "the amount paid for admission to any place." In arguing that this language applies to the compensatory fees charged by petitioner for the use of its beach, respondent has heretofore placed his sole reliance on a literal reading of the statute. As the Court has recently indicated in answer to a comparable argument, if such a reading leads to an unreasonable result in a situation not specifically considered by Congress, it will not be adopted.

In *Foley Bros.* v. *Filardo*, 336 U. S. 281 (1949) the court held that the words "every contract to which the United States * * * is a party * * *" did not apply to certain contracts to which the United States is a party, namely, contracts for construction in a foreign country. Although the words of the statute were clearly applicable to the contract in question, there was no additional evidence of Congressional intent to apply the statute to that type of contract.

In the instant case respondent has apparently taken the position that the statute applies to every fee imposed for the privilege of entering any defined area. This position is clearly erroneous. In providing for an admissions tax Congress undeniably intended to exclude some such fees. These limitations appear upon a consideration of the history of this act.

The admissions tax appeared for the first time in the Revenue Act of 1917. (40 STAT. 300, 319-320.) The sources of revenue to which Congress turned to finance the prosecution of World War I were, in the words of President Wilson, "war profits and incomes and luxuries."[1] Taxes on admissions to places of entertainment, on cabarets and on private club dues clearly come under the heading of luxury taxes.

Provision for these three taxes, the admissions tax, the cabaret tax and the dues tax was made in Title VII. The same rate was prescribed for all three taxes and the three were grouped together. All three may be properly characterized as wartime luxury taxes.

In the original 1917 version of the admissions tax statute, Congress used the same broad language contained in the present act. In fact the language of the two acts is identical except that the rate was doubled in the current act. The 1917 statute provided for:

> "* * * a tax of 1 cent for each 10 cents, or fraction thereof of the amount paid for admission to any place. * * *" 40 STAT. 319.

If construed literally, these words would have required the collection of a penny tax from every person paying

1. It was expressly stated in Senate Report No. 767, 65th Cong. 3d Sess., at page 22, that both the House Ways and Means Committee and the Senate Finance Committee intended to follow President Wilson's recommendations to tax "war profits, incomes and luxuries."

ten cents to a street car conductor for admittance to a public conveyance. They would have required the payment of a ten per cent tax on tolls charged by local governments for the privilege of entering upon a toll bridge or a toll road. Literally such charges are amounts paid for admission, but it is plain that Congress did not intend so all inclusive a levy.

The House Report on H. R. 4280, which became the Revenue Act of 1917, demonstrates that the legislators wanted to tax the luxury of being entertained, rather than the necessity of using essential transportation facilities. In recommending the adoption of the admissions tax, the Ways and Means Committee of the House plainly identified the types of admissions that should be taxed. The Report states:

> "It is recommended that this tax be imposed upon all places to which admission is charged, such as motion picture shows, theatres, circuses, entertainments, cabarets, ball games, athletic games, etc." H. R. Rep. No. 45, 65th Cong. 1st Sess. (1917), 8.

Respondent would have the court interpret this statute and its re-enactments as though the House Committee had omitted the words "such as motion picture shows, theatres, circuses, entertainments, cabarets, ball games, athletic games, etc." These words were included in the Report to identify the type of admissions which Congress wanted to tax. If the legislators had intended the broad language of the statute to apply literally and without any reasonable limitation, the recommendation of the Committee would simply have been that the "tax be imposed on all places to which admission is charged." It is impossible to ignore the difference in meaning between (a) "all places" and (b) "all places such as motion pictures, theatres, circuses, etc." Respondent favors the former; the House Report adopted the latter.

It is, of course, not contended that the enumeration of examples was intended to be an exhaustive list of taxable admissions. But it was plainly intended to characterize the type of admissions which should be subject to the tax. All the examples listed in the Report dealt with spectator admissions. In that respect this characterization was comparable to that adopted in the English statute where "the expression 'admission' means admission as a spectator or one of an audience." *Attorney General* v. *Southport Corp.* (1934) I. K. B. 226, 236. The nearest thing to a definition of the term "admission" in the 1917 American statute also identifies the character of the tax. Congress did not adopt a technical definition which would cover all fees exacted as a condition precedent to entrance into any and all enclosures. Instead, it merely provided that the "term 'admission' as used in this title includes seats and tables, reserved or otherwise, and other similar accommodations and the charges made therefor." In so doing, as was the case in enacting the other provisions of the statute, Congress expressed its central purpose of imposing a luxury tax on entertainment charges.

The admissions tax, which had its origin as a war-time luxury tax, is essentially an entertainment tax. It applies to every payment made for the privilege of entering a theatre, night club, or other inclosure for the purpose of enjoying commercial entertainment. The tax does not apply to compensatory fees paid by citizens who utilize recreational facilities in public parks. The tax applies to the luxury of patronizing private, commercial amusement activities; it does not apply to the use of public park facilities.[2]

2. The contrast between taxable commercial amusement facilities and exempt public park facilities is illustrated by a comparison of the activities which the House Report indicated should be taxable ("motion picture shows, theaters, circuses, entertainments, cabarets * * *") with the park activities which the Illinois

This conclusion is amply supported by the absence of evidence of affirmative purpose by Congress to tax compensatory charges for the use of public park facilities. If Congress had intended to interfere with such a basic function of local government, it would have expressed that intent in specific language, either in the statute itself or in the committee reports. And if the Commissioner of Internal Revenue had thought that Congress meant to tax such activities, he would have tried at an early date to tax fees charged for admission to and use of municipal tennis courts and golf courses. The Commissioner has never attempted to tax such fees either as "admissions" or as "dues". S. T. 357, I-1 C. B. 434, although the privilege of playing golf or tennis as a member of a private club is taxable under the dues tax provisions. 53 STAT. 192, *as amended*, 55 STAT. 711 (1941), 26 U. S. C. § 1710, 1712.

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statute specifically authorizes petitioner to maintain. See Ill. Rev. Stat. Ch. 105, Sec. 11-5.

"Submerged Land Park Districts shall have power to plan, establish and maintain field houses, gymnasiums, assembly rooms, *comfort stations*. indoor and outdoor swimming pools, wading pools, bathing beaches, bath houses, locker rooms, boating basins, boat houses, lagoons, skating rinks, piers, conservatories for the propagation of flowers, shrubs, and other plants, animal and bird houses and enclosures, athletic fields with seating stands, golf, tennis and other courses, courts, and grounds, and the power to make and enforce reasonable rules, regulations and charges therefor. The express enumeration of each of the foregoing recreational facilities and equipment which park districts are herein given the power to provide shall not be construed as a limitation upon said park districts or any other form of park destrict described in this code, nor prohibit any park district from providing any other athletic and recreational facilities or equipment which may be appropriate in any park acquired, laid out, established, constructed and maintained by any park district, nor shall the same in any way be held to limit the power and authority by this code conferred upon park districts." (Emphasis added.)

It should be noted that most of these park activities may be performed in an enclosed area, and thus may literally be subject to an admissions tax.

In specifying that the dues tax should apply to such private fees, Congress referred indiscriminately to "golf, tennis, polo, swimming, or other athletic or sporting privileges or facilities." 26 U. S. C. 1712. Nowhere in the statutory scheme did Congress indicate that there should be any difference in treatment of golf and swimming. Nor during World War I and the years preceding World War II did the Commissioner find any reason to draw any such distinction. During World War II, however, the Commissioner apparently decided that compensatory fees charged by public parks for swimming privileges should be treated in the same way that Congress, during World War I, had decided that fees for commercial or private club entertainment should be treated. He therefore has attempted to draw a wholly indefensible distinction between golf greens fees and swimming fees. His present position that swimming fees are taxable as "admissions" is inconsistent with his ruling that golf greens fees are not taxable, S. T. 357, I-1 C. B. 434, and also with his previously consistent practice of not taxing swimming fees.

Consistent administrative interpretation may be a valuable aid to the judicial task of construing a statute. Administrative interpretation of the Admissions-Cabaret-Dues Tax statute, to the extent that it is consistent, supports the conclusion that Congress never intended to levy any tax on fees paid for the use of municipal facilities.

This conclusion is inescapable if the statute is considered as a whole. Certain specific exemptions allowed by Congress in the Revenue Act of 1921, 42 STAT. 1120, can be explained only on the theory that Congress assumed that municipal activities, such as charges for the use of park facilities, were themselves exempt from the tax burden. The exemption section, since repealed, provided in part that:

"No tax shall be levied under this subchapter in

> respect of * * * any admissions all the proceeds of which inure (1) exclusively to the benefit of * * * societies or organizations conducted for the sole purpose of * * * improving any city, town, village, or other municipality, or of maintaining a cooperative or community center moving picture theater. * * *" 42 STAT. 1120, 26 U. S. C. 1701.

It is undisputed that all the proceeds of the charges for the use of petitioner's beach are utilized to support that park activity. The funds are therefore used for the sole purpose of improving the municipality. The only reason for saying that petitioner does not fall squarely within the language of this exemption is that the Wilmette Park District is not a "society or organization".

In terms the exemption applied to charges made by a civic organization for the purpose of improving the municipality. It did not apply to charges made by the municipality itself for the same purpose.[3] As applied to petitioner's beach, the exemption would have been expressly applicable if a non-profit civic organization were formed for the sole purpose of operating the beach. The exemption would have been applicable if petitioner made use of such an organization to raise the funds for the support of the beach; it was not applicable where the municipality itself handled the ticket sales.

The reason for this superficial anomaly is perfectly clear. The municipal activity was never taxed and the purpose of the exemption was merely to give civic organizations performing municipal functions the same immunity which the municipality itself enjoyed. The only possible explanation for an exemption which applied to a park activity spon-

3. Respondent adopted this construction by serving notice on petitioner to collect a tax on all "admissions" on and after July 25, 1941. Since the exemption provision was in effect at that time and until the enactment of Revenue Act of 1941 on September 20, 1941, 55 STAT. 687, it is apparent that the Collector construed the exemption as inapplicable to petitioner.

sored by a civic organization, but not to an identical park activity sponsored by the local government itself, is that Congress assumed that there was no need to exempt the government activity because it had not been nor had Congress intended that it should be taxed in the first place.

Although this special exemption to civic organizations had nothing to do with the exempt status of a municipal corporation, it does furnish a valuable aid in ascertaining the meaning of the words "amount paid for admission to any place." When the provision for exempting the civic organization was repealed on September 20, 1949 the repeal, of course, had no effect upon the well understood immunity of the municipal corporation.[4]

Since the charge made by Wilmette Park District is not an "admission" within the meaning of § 1700, it is immaterial what it is called. It cannot be imposed by petitioner for the privilege of entrance. The only statute authorizing any fees whatsoever limits petitioner to charges made for use of its facilities. (Chap. 105, § 269, Ill. Rev. Stat. 1947)[5] The tickets state on their face that the charge is made "for beach and beach house privileges" (R. 14 (a)) which include the bath house, toilets, washrooms, lockers, and other

4. Inasmuch as the Collector's order directing petitioner to collect the admissions tax was made on July 24, 1941, it is assumed that respondent will not contend that the removal of the exemption on September 20, 1941 had any effect on petititioner's tax liability.

5. Cf., The obligatory charge under Ill. Rev. Stat. Ch. 105, Sec. 8-d (1947) which statute provides: "Each park district which issues bonds and constructs a swimming pool under Section 8-7 hereof *shall charge for the use thereof* at a rate which at all times is sufficient to pay maintenance and operation costs, depreciation, and the principal and interest on the bonds. Such district may make, enact and enforce all needful rules and regulations for the construction, acquisition, improvement, extension, management, maintenance, care and protection of its swimming pool and for the use thereof. Charges or rates for the use of the swimming pool shall be such as the board may from time to time determine by ordinance." (Emphasis added.)

facilities (R. 42). The findings of fact specifically characterize the charge imposed by petitioner as one for "use of the beach and beach facilities" (R. 42, 43).

The charge is similar to fees collected from users of public toll roads, toll bridges, and parking areas. The parking area maintained by the Chicago Park District at Grant Park may be entered and used by the driver of an automobile only after paying a charge of fifty cents. He then may make use of the parking facilities for ten minutes or twenty-four hours—exactly as a purchaser of a daily beach ticket may make use of petitioner's beach facilities for the same period. Though each of the fees in these examples is literally an "amount paid for admission to any place" no admissions tax is levied on any of them.

Congress, then, never intended to tax this charge. And as will be demonstrated below, it never had the power to do so.

II.

The Constitutional Question.

A.

Under the federal system local governments have the primary duty of providing for the health, safety, and general welfare of the people. This duty is discharged by courts, police and fire departments, public schools, park districts, sewage systems, waterworks, and other activities maintained for the benefit of the local population.

These public services are immune from federal taxation. This Court has always recognized that the Federal Government was not granted any power to tax the more basic services performed by local governments. No judge has ever suggested that the power of the Federal Sovereign to tax the sovereign States is unlimited.

That an area of State immunity exists was recognized by the entire Court in *New York* v. *United States*. *See* 326 U. S. 572, 583, 587-588, 590-598.[6] This area includes the maintenance of public parks.

Mr. Chief Justice Stone, in an opinion joined by Justices Reed, Murphy and Burton listed "public parks" among the State activities which were constitutionally immune from "a general non-discriminatory real estate tax (apportioned), or an income tax levied upon citizens and States alike." He stated:

> "A state may, like a private individual, own real property and receive income. But in view of our former decisions we could hardly say that a general non-discriminatory real estate tax (apportioned), or an income tax laid upon citizens and states alike could be constitutionally applied to the state's capitol, its state house, its public school houses, *public parks*, or its revenues from taxes or school lands, even though all real property and all income of the citizens is taxed." (326 U. S. at 587-588. Emphasis added.)

This statement plainly identifies the maintenance of public parks as the type of governmental service which constitutionally cannot be burdened by Federal taxation.

And for good reason. Parks have played an important part in community living throughout Anglo-American history. Before the adoption of the Constitution and indeed before the discovery of this country our English forbears maintained so-called Commons in which the public held common rights. From this origin by gradual process of development nearly every village, town and city has established commons, squares or open places for the recreation of the public. Such places, now uniformly called parks, have been maintained at public expense and by general

6. "All agree that not all of the former immunity is gone." Mr. Justice Rutledge concurring at page 584.

taxation.[7] With the increased complexity of modern life, the maintenance of parks where the entire family may find relaxation, aesthetic enjoyment, and physical exercise is more important than ever before. Park activities make a real contribution to the health, both mental and physical, of the residents of modern municipalities.

The national government is without power to limit the extent of that contribution by exacting tribute from the local sovereign for performing these functions. The state has the same right to minister to the health and recreational needs of its citizens as it has to provide for their safety and education. The operation and maintenance of schools, parks, sanitation facilities, police and fire protection; these are all activities of the same fundamental character.

Moreover, it is clear that the various public park activities which contribute to fulfilling the basic objectives of modern park programs are entitled to the same immunity as the park system itself. The right of the state to maintain public parks includes the lesser right to maintain such recreational facilities as golf courses, tennis courts, swimming pools, bathing beaches, bird houses, conservatories[8] and other facilities. Since some find relaxation in passive pursuits while others prefer athletic endeavors, a typical public park will offer both types of activities for the bene-

7. It is too late to contend that the operation of parks and park facilities universally carried on by local governments in all the States of the Union is the conduct of a business; a commercial activity. *See e.g., Commissioner* v. *Schnackenberg*, 90 F. 2d 175 at 176 (C. A. 7, 1937).

8. See Ill. Rev. Stat. Ch. 105 § 269 where the authority of park districts to perform these and similar park functions is expressly recognized. Insofar as our particular situation is concerned, it should be noted that Illinois cases are uniform in recognizing that in operating a bathing beach, a park district acts as a sovereign and not as an entrepreneur. *See e.g., Gebhardt* v. *The Village of La Grange Park*, 354 Ill. 234 (1933); *Hendricks* v. *Urbana Park District*, 265 Ill. App. 102 (1932).

fit of the entire community. It cannot be said that there is any significant difference between the bathing beach maintained by petitioner at Washington Park and any of the other normal activities supplied there and at other public parks. In fact such public beaches or municipal pools can be found in nearly every community.

B.

Neither the character of a public function, nor its immunity from federal taxation, is affected in the slightest by the fact that private agencies may perform similar functions for the purpose of making a profit. The maintenance of private schools by non-government agencies does not relieve the local government of its obligation to provide for the education of its citizens. Nor does the existence of private sanitation facilities diminish the importance of health functions performed by the state. It is equally clear that the place of the public park in modern society is not changed by the fact that businessmen sometimes capitalize on the health and recreational wants of the public by operating amusement parks or picnic areas for profit.

Though such private agencies may supplement its work, the local sovereign cannot be said to be relieved of its primary responsibilities because of their existence.[9] The existence or non-existence of such private agencies has no effect on the tax immunity of the local sovereign in performing such essential governmental functions.

9. In fact the state has undertaken most of its responsibilities only because private agencies failed to meet completely the needs of its citizens.

C.

A federal tax on the right to use public park facilities directly burdens the local government notwithstanding the fact that the actual payment of the tax is made by persons who use the facilities. The tax is a burden on the local government because it tends to frustrate an important governmental policy. The municipality's objective is to provide bathing facilities for the use of the general public. The effect of the federal tax is to erect a financial barrier between the public and those facilities. Such a barrier clearly has a tendency to deny some families access to the beach, contrary to the policy of the local government.

Respondent has argued that the admissions tax is not an "undue interference" with petitioner's policy of furnishing bathing facilities because the tax is actually payable by the persons who make use of the beach.[10] If this argument is sound, it applies whether petitioner makes a charge for the use of the beach or not. The argument is that a tax on the right to go swimming at a public beach is not a burden on the local sovereign because the tax is paid by the swimmer. Respondent is thus arguing that the federal government has the constitutional power to tax the right of every citizen to go swimming at a public beach, or for that matter, to make use of any other park facility, whether or not a charge is made. Yet it must be too clear for argument that if the national government has the power to tax the citizen who seeks to enter and use the courts, the schools or the public parks, the exercise of that power hinders and interferes with the activities of local government.

Nor is there any justification for suggesting that the burden on the state is not "undue" because the tax is relatively modest. One could hardly devise a more effec-

10. Brief for Respondent in opposition to Petition for Certiorari, p. 10.

tive interference with the state's desire to furnish bathing facilities to the public than the imposition of a twenty per cent levy, unless it would be an even higher levy, and the court has not heretofore evidenced any disposition to determine the question whether a tax burdened an immune activity simply by considering whether the amount of the tax was so high as to result in an undue burden. The state's immunity from taxation is not to be destroyed by any formula which merely renders it immune from destructive taxation. It is clear that the twenty per cent tax involved in this case is high enough to substantially curtail the use of petitioner's beach. Moreover, such curtailment will in all probability affect the ability of the local sovereign to finance the project.[11]

The vice of the admissions tax as applied to public park activities would, of course, become more and more apparent as the amount of the levy increased. A ten dollar tax on the right to play golf on a municipal golf course or a five dollar tax on the right to go swimming on a municipal beach would deny millions of Americans a regular and valued form of recreation. Such an interference with the state's function of ministering to the health and recreational needs of its citizens would plainly be unconstitutional. This is true even though it is equally clear that the federal government has the power to impose a ten dollar tax on private country club memberships or even on the right to enjoy some form of amusement such as the opera or a championship boxing match. The constitutionality of the tax is not dependent on its amount; it depends on the character of the activity which it burdens.

11. This tax would not be imposed if petitioner had diffused the beach's operating costs by general taxation. If the Collector is sustained, the Federal government will have been able to compel the activity to be financed, if financing is possible at all, by a general property tax levy which petitioner does not consider appropriate for this purpose.

D.

The Federal Government does not acquire the right to tax a State activity which would otherwise be immune merely because the local government partially supports that activity by charging a compensatory fee to persons who benefit from it. It is plain that the character of an immune activity is not affected by the method in which it is financed. If a state activity is immune from federal taxation when operating costs are met from general tax revenues, it is no less immune because the local government decides to defray its costs, in whole or in part, by imposing a fee on those directly benefited.

Many municipalities maintain court systems particularly designed for the adjudication of small claims. Costs are reduced to a minimum so that such courts will be available to as large a segment of the community as possible. These costs are imposed on the litigants because it is only proper that those who make use of the courts shall share in some measure the financial burden of their support. Yet any increase in court costs necessarily tends to deprive some citizen of his day in court. To superimpose a federal tax would obviously have the same effect. And though the tax be paid by the litigant, it would hamper and curtail the capacity of local government to serve the people.

Many states find it desirable partially to meet the cost of public education by the imposition of small fees. They are rarely compensatory and never designed to make a profit. By this means the state merely asks the primary beneficiaries of its educational program to bear a share of the burden of supporting it.

These examples illustrate that the method of financing a governmental activity has no bearing on the question whether it is immune from federal taxation. In considering this constitutional question, it is of no importance

whether the activity is supported in its entirety by general taxation, by special annual assessments levied on those who benefit from it, or by a use tax or fee collected every time anyone enjoys its benefits. It is the character of the function which is decisive.

When a state conducts a business enterprise such as selling liquor, mineral water or grandstand seats, immunity cannot be claimed merely because the trading venture is carried on by a state. Such a commercial activity conducted for the purpose of making a profit is fundamentally different from the type of public service performed by petitioner. Its beach activity was not conducted for gain and in fact the operation has regularly resulted in a deficit. The fees imposed by petitioner had neither the purpose or effect of making a profit. The imposition of such partially compensatory fees does not destroy the immune character of the public park activity.

In terms of the character of the state activity involved and in terms of the nature of the burden on that activity, the differences between the instant case and *Allen* v. *Regents*, 304 U. S. 439 (1938) are perfectly clear. The park activity here involved is itself an immune function of government. In contrast, the business of sponsoring athletic spectacles is not immune even though the proceeds of the business may be used to support an immune activity. This rather obvious, though crucial, distinction has been stated succinctly by Professor Powell. Referring to the opinion of Mr. Justice Roberts for the court in the *Allen* case, Professor Powell writes:

> "The immunity, he says, 'does not extend to business enterprises conducted by the States for gain.' *The business enterprise to which he refers is not education, but the athletic contests.* Immunity cannot be claimed for the proceeds of business enterprise, even if those proceeds are used for a concededly governmental function. Mr. Justice Butler, in dissenting,

either misses the point or rejects it when, by way of comparison, he says that 'It is hard to understand how the collection by the State of fees for the privilege of attendance brings, even for the purpose of Federal taxation, its work of education to the level of selling intoxicating liquor * * * operating a railway * * * or conducting any other commercial enterprise.' "

Powell, *The Waning of Intergovernmental Tax Immunities* (1945), 58 HARV. L. REV. 633, 647.

Mr. Justice Butler correctly argued that the collection of fees could not convert an immune activity such as public education into a commercial enterprise. But neither could the application of the proceeds of a business venture to an immune activity render the business itself immune. If a state runs a business that business is taxable no matter what disposition is made of its profits.

Moreover, the admissions tax imposes a burden on petitioner which is entirely different from that imposed on the State of Georgia in the *Allen* case. The burden imposed on Georgia was the burden of collecting the tax from non-student patrons of its athletic contests. The tax was not levied on students seeking educational benefits, or even on students seeking admissions to the football games as spectators. Unlike the situation in the instant case, the tax on the *Allen* case raised no barrier between the state's activities and its intended beneficiaries. The only barrier raised by the tax was between the general public and the opportunity to watch a spectacular event. The general public had no constitutional right to watch a spectacular event put on for profit without paying the admission tax.

Since the character of the activity and the nature of the burden in the instant case are basically different from that in the *Allen* case, the result must also be different. Citizens have a constitutional right to enter and enjoy a public park on the terms and conditions prescribed by the local

government which maintains the park. To the extent that the federal government taxes this right, and thus erects a financial barrier around the state park, the policy of the local government to make its park facilities generally available is frustrated. The frustration of this basic state policy is clearly an unconstitutional burden on the local sovereign.

E.

Since public parks have always been exempt from Federal taxation, the specific recognition of this immunity will not reduce the sources of Federal revenue in the slightest. Considerations which motivated the decision of *South Carolina* v. *United States*, 199 U. S. 437 (1905), and *New York* v. *United States*, 326 U. S. 572 (1946), are therefore inapplicable here. In those cases the Court was concerned with the possibility that States, by embarking in businesses which had previously been subject to the Federal taxing power, would greatly extend the area of immunity and thus eliminate important sources of Federal revenues. No such possibility exists with respect to public parks because their immunity has been traditionally recognized.

The discussion of the *South Carolina* case by the Court of Appeals for the Second Circuit in *Commissioner* v. *Shamberg's Estate*, 144 F. 2d 998 (1944), is pertinent here. In that case the Court held that interest on obligations of The Port of New York Authority were not subject to the Federal income tax. The following statements emphasize the contrast between a private, profitable business which has always been taxable, and a public activity which is historically and properly immune from Federal taxation:

> "The Commissioner also relies on *State of South Carolina* v. *United States*, 199 U. S. 437, 26 S. Ct. 110, 50 L. Ed. 261, 4 Ann. Cas. 737, as indicating that the exemption should not be applied to state activities

which are not wholly essential to its sovereignty. The argument is based on the claim that the exemption provision must be interpreted in the light of that decision, which it is said governed the extent of the constitutional power to tax at the time when the exemption statute was enacted. We have already said that, in our opinion, the exemption provision was not limited to cases where federal taxation was constitutionally possible in 1913, but covered a broader field where taxation of obligations was doubtful and subject to contention by the states. But even assuming the government's interpretation of the exemption provision as merely enacting the constitutional doctrine as of 1913, we do not think that the *South Carolina* case would permit taxation of such a state agency as the Port Authority. That decision related only to the power of the government to impose the usual license taxes upon dispensaries established by the state for the wholesale and retail sale of liquor. It held that such a state agency was subject to the tax, and that the constitutional limitation did not extend to instrumentalities used by the state in carrying on an ordinary private business. This was plainly a commercial business which resulted in one year of a profit of about $500,000 which was divided between the state and local municipalities. Such a holding seems to us far from indicating that it was ever applicable to agencies having customary governmental activities, such as development of roads, bridges and waterways entered upon with no profit motive.

* * * * *

"Indeed, in *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151, 173, 29 S. Ct. 458, 53 L. Ed. 742, decided in 1909, the South Carolina decision was explained upon the ground that a state had no power by legislation in regard to the sale and consumption of liquor to destroy a pre-existing right of taxation of the federal government. Any claim that the South Carolina decision governs the present case proves too much, for, if it be read as permitting taxation of almost every governmental activity, it would certainly fly in the face

of the practice of the Treasury Department for the last forty years and the opinions of the two Attorney Generals acted upon by the treasury, since it has never been held, nor is it here contended, that income from such state agencies as irrigation and levee districts is not exempt, although neither of these activities, nor even the existence of the districts, is essential to the state. Here the actvities, even though some of them might have been exercised by private corporations under appropriate legislation, are exercised for a public purpose by an agency set up by the states and given many public powers, though not of taxation or control through the suffrages of citizens. It minimizes its public and political character to treat such an agency as a private corporation merely because of the lack of taxing power which is only one of the attributes of sovereignty." 144 F. 2d at 1005.

In short, the states never granted to the Federal Government the power to tax this sort of activity. And Congress, in enacting the Admissions tax, did not attempt to exercise such power.

F.

Petitioner did not collect any tax in connection with the sale of its tickets nor did it make any profits from the operation of the beach. Consequently if petitioner is to be held liable for penalties which respondent seeks to impose, those penalties must be paid out of petitioner's funds which are derived from general property taxes.

But the Federal Government has no power to infringe the sovereignty of a local government by imposing a penalty which can only be paid out of its general funds. Assuming that petitioner has a duty to pay such a tax, or to satisfy a judgment for a tort, nevertheless such a duty can not be enforced by a sheriff's levy, or by the collector's distraint levy, on petitioner's general funds any more than it can be enforced by a levy on a school house, a water purification plant, or a court-house. One of the chief

attributes of sovereignty is insulation from such process; the sovereign is not much a sovereign if it can be compelled by force or by threat of force to offer up its funds. Nor, if we are to be protected "from clashing sovereignty", see *M'Culloch* v. *Maryland*, 4 Wheat. 316, 429 (1819), can one sovereign have any greater power to punish another sovereign or to seize its property than any ordinary citizen has. The delicate nature of the relationship between the federal union and the sovereign states comprising it requires the federal government to pay an even more exacting respect to this attribute of sovereignty. *Cf., Kentucky* v. *Dennison*, 24 How. 66 (1861); *Luther* v. *Borden*, 7 How. 1 (1849); *Coleman* v. *Miller*, 307 U. S. 433 (1939).

Conclusion.

For the above reasons it is respectfully submitted that the judgment of the court below should be reversed and that petitioner's claim for refund be granted.

HENRY J. BRANDT,
GILBERT H. HENNESSEY, JR.,
ROBERT F. FUCHS,
Attorneys for Petitioner.

POPPENHUSEN, JOHNSTON, THOMPSON & RAYMOND,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 75

WILMETTE PARK DISTRICT,
Petitioner,

v.

NIGEL D. CAMPBELL, Collector of Internal Revenue.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

REPLY BRIEF FOR THE ~~RESPONDENT~~ PETITIONER.

HENRY J. BRANDT,
GILBERT H. HENNESSEY, JR.,
ROBERT F. FUCHS,
EDWARD I. ROTHSCHILD,
Attorneys for Petitioner.

POPPENHUSEN, JOHNSTON,
THOMPSON & RAYMOND,
Of Counsel.

Chicago, Illinois.

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REPLY BRIEF FOR THE RESPONDENT.

I and II.

1. The tax upon charges for admission to *any* place was not intended to tax every charge on every admission to every place. In arguing that every such charge was intended to be taxed, respondent ignores the many charges for admissions never made subject to this tax as well as those charges which respondent admits are not subject to the tax.[1]

2. The fact that fees charged by *private* clubs and commercial enterprises as *mixed* use and admissions charges are subject to this tax has no bearing on the

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[1] Golf greens fees, S. T. 357, I-1 C. B. 434; charges for admission to and use of tennis courts, Respondent's Brief, p. 14 n. 8.

issue of the applicability of the tax to charges to defray the cost of providing public park facilities. The cases cited by respondent, Respondent's Brief, p. 12, deal only with private and commercial enterprises. No private or commercial activity is involved here. The beach is operated by petitioner at cost or at a loss, R. 14(b), in the exercise of petitioner's function of providing park facilities. The facilities provided include toilets, a bathhouse, lifeguards, playground equipment, etc., all directly related to the traditional health, safety and recreational functions of parks. To interpret the admissions tax as applying to charges made to defray the cost of maintaining such facilities is to strain the congressional intent. For Congress expressed its intent to limit the tax to luxuries and spectacles such as picture shows, theatres, circuses, entertainments, cabarets, etc. Petitioner's Brief, pp. 10-11.

3. Consistent interpretation of the basic statute from 1917 to 1941 is a further indication of the intent that such charges not be taxed. In the first 22 years after the publication in 1919 of the regulations specifically relied upon by respondent, Treasury Regulations 43 (1919 ed.), Pars. 5, 8, 9 and 10, Respondent's Brief, p. 13 n. 7, respondent made no attempt to impose this tax upon the fees charged by petitioner and the thousands of similar park units for the use of such facilities. Where a tax is not applied to a particular type of activity for 22 years, the only inference that can be drawn from congressional silence and inaction is that Congress intended no such tax.

III.

4. The operation of a bathing beach is a proper park function and respondent has conceded, Respondent's Brief, p. 29, that park activities are constitutionally immune from federal taxation. To hold that the maintenance of

a public beach is not a park function would only result in park authorities being, to the extent of this tax, less able to take advantage of available natural resources capable of giving riparian communities the very benefits which, because of their health and recreation aspects, render park functions immune. To confine park functions to green grass, a baseball field, benches, rings and swings, is to create an artificial characterization at odds with the reason and real basis of the park immunity. Where the purpose of the immunity can be fulfilled by the public operation of public beaches, such beaches, coming within the purpose of the immunity, must also be immune.

5. The fact that a beach operated as a commercial enterprise for a profit would be taxable does not make the public operation of a beach at or below cost also taxable. Quite the contrary. For it was the *commercial* operation of the football spectable, mineral water industry and liquor stores which made those activities taxable in *Allen* v. *Regents,* 304 U. S. 439, *New York* v. *United States,* 326 U. S. 572, and *Ohio* v. *Helvering,* 292 U. S. 360, respectively.[2] Petitioner concedes that had the beaches been operated as a business for the purpose of making a profit,[3] the fees charged to its users would be subject to this tax. But its non-commercial, non-profit nature removes the activity from the holding and reasoning of the line of cases cited by respondent. And the fact that the beach performs the traditional park functions of health and recreation places it among park activities admittedly immune.

6. Respondent admits, arguendo, not only that the maintenance of public parks is immune but that this bath-

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[2] In these cases the enterprises were not only commercial; they were in fact profitable.

[3] Profit is used in its normal business sense to mean excess of income over costs. Compare Respondent's Brief, p. 31.

ing beach is maintained by petitioner in the interest of the health and welfare of the public. Respondent's Brief, p. 29. He argues, however, that liquor and football games are also related to health and welfare and are nevertheless taxed. This is conceded. But the *commercial operation* of football games and liquor stores was not related to health and welfare. Only because of their commercial nature were these activities taxed.[4] No such commercial activity is carried on by petitioner. And thus no tax can be justified on the basis of the liquor-mineral water-football game reasoning.

7. If the providing of a public beach as a part of a public park system is an immune activity, the limited power of the federal government, because of the very nature of constitutional immunity, does not include the power to interfere with, restrict, or burden that activity by a tax either directly upon the state government maintaining the beach or directly upon those who make use of the beach and for whose benefit the immunity exists. In this phase of his argument, respondent is willing to assume that the beach activity is immune. Respondent's Brief, p. 20. But despite this immunity, he argues that the fees paid by beach users can be taxed since the first impact of the tax falls not on petitioner but on the public.

If the beach activity is immune, it is because such activity is within the health and welfare purposes of accepted park activities. If this is so the *activity* is immune and therefore beyond the reach of the federal government. To admit that the federal government cannot impose a tax on

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[4] In the Regents case, to the extent that the football games were assumed by the court to be an integral part of the State's program of public education, i. e., for the student participants and student spectators, they were not taxed. Allen v. Regents, 304 U. S. 439, 450.

the activity or directly on the government which provides it, and then to state that the federal government can nevertheless tax the users of the beach, is to give immunity a new meaning.[5] For the activity can hardly be immune if tribute can be exacted from those who seek to enjoy the activity before they are permitted to do so.

Not even respondent's mathematical mumbo-jumbo can hide the realistic burden on the "immune activity" and the realistic barrier erected between the public and the public beach by the imposition of this tax. There can be no question but that in the language of constitutional law, a "burden," "limitation" or "interference" results from the imposition of a 20% tax on the fees paid by the public to defray the cost of maintaining these facilities. The increased charge does not disappear by stating that it is not a barrier.

Respondent's theory is that a tax on those who benefit from an immune activity is not an unconstitutional burden while a tax *directly* on the local government which maintains the immune activity is such a burden. His theory proves too much. For, if correct, a tax could be imposed on those benefited by such immune activities as filing suits in state courts, attending public schools, receiving police protection, etc., all on the theory that since it is the person who pays, rather than the state, no "burden" exists.

Equally untenable is respondent's argument that the barrier which exists between the citizen and the benefit can be eliminated by a reduction in the amount of the fees charged by petitioner. Respondent's Brief, pp. 21-22.

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[5] See Lewis Carroll, Through the Looking Glass, Chapter VI: " 'When I use a word,' Humpty Dumpty said, in a rather scornful tone, 'It means just what I choose it to mean—neither more nor less.' "

Such reduction would merely shift the tax from the bather to petitioner. Thus the method suggested for removing the barrier created by the tax on the citizen results in the very type of direct tax upon petitioner which respondent assumes, in this part of his argument, to be unconstitutional.

Respectfully submitted,

HENRY J. BRANDT,
GILBERT H. HENNESSEY, JR.,
ROBERT F. FUCHS,
EDWARD I. ROTHSCHILD,
Attorneys for Petitioner.

POPPENHUSEN, JOHNSTON,
THOMPSON & RAYMOND,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 801

WILMETTE PARK DISTRICT, PETITIONER

v.

NIGEL D. CAMPBELL, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion, findings of fact and conclusions of law of the District Court (R. 25-27, 41-44) are reported at 76 F. Supp. 924. The opinion of the Court of Appeals (R. 63-69) is reported at 172 F. 2d 885.

JURISDICTION

The judgment of the Court of Appeals was entered on February 23, 1949. (R. 69.) Petition for rehearing was denied March 18, 1949. (R. 70.)

The petition for a writ of certiorari was filed on May 18, 1949. The jurisdiction of this Court rests upon 28 U.S.C., Sec. 1254.

QUESTIONS PRESENTED

1. Whether Section 1700 of the Internal Revenue Code, which imposes a tax on charges paid for admission "to any place", applies to charges made by petitioner, a local governmental agency, for admission to a public bathing beach.

2. Whether collection of the tax is unconstitutional as a burden on a state activity which is immune from federal taxation or because under Section 1718 of the Code liability for the tax rests on petitioner by reason of its refusal to collect the tax from persons seeking admission to the beach.

STATUTE AND REGULATIONS INVOLVED

The pertinent statute and Treasury Regulations are set forth in the Appendix, *infra,* pp. 13-18.

STATEMENT

The essential facts found by the District Court (R. 41-44), taken principally from the stipulation of facts (R. 11-14), are as follows:

Petitioner is a body politic and corporate organized in 1908 under the laws of Illinois. Illinois Revised Statutes (1945), c. 105, Sections 256 through 295. It is administered by a board of commissioners under the provisions of the Illinois

statutes elected by the people residing in the district. (R. 41.)

The Wilmette Park District consists of an area of approximately 2.8 square miles located within the incorporated area of the Village of Wilmette, Cook County, Illinois, which village has a population of approximately 20,000. Included within the District are four park areas aggregating approximately .78 square miles. The largest park area, known as Washington Park, extends along the shore of Lake Michigan for approximately three-fourths of a mile. The land area of Washington Park was acquired partly by grant from the State of Illinois, partly by purchase and partly by the exercise of the right of eminent domain. (R. 41-42.)

For more than 25 years, petitioner's riparian property at the north end of Washington Park and in the shoal waters of Lake Michigan adjacent thereto has been used as a bathing beach during the summer months. (R. 42.)

During the years 1941 through 1944, petitioner supplied the following services and facilities for use in conjunction with the bathing beach: a bath house containing clothing lockers, toilets and wash rooms, an automobile parking area, life-saving equipment, flood lighting, drinking fountains, showers, spectator benches, bicycle racks, first-aid personnel, and supplies. In connection with the operation and maintenance of the bathing

beach, petitioner employs a beach superintendent, a secretary, beach maintenance labor, life guards, check room and gate check workers, general office workers and policemen. (R. 42.)

The bathing beach facilities are utilized principally by the residents of the Wilmette Park District, but the facilities are also utilized by non-residents. (R. 42.)

Petitioner makes two types of charges to users of the beach and beach facilities: (1) a flat rate for a season ticket issued on either an individual or family basis, and (2) a single daily admission charge of 50 cents on week-days and $1 on Saturdays, Sundays and holidays, for which no tickets are issued. The charge made by petitioner for the use of the beach and beach facilities is made to cover maintenance, operation and some capital improvements. Over the years the charge for the use of the beach and beach facilities is intended merely to approximate these costs, and not to produce net income or profit to the Park District. (R. 42-43.)

From Gary, Indiana, to Lake Bluff, Illinois, there are 29 municipally operated bathing beaches, some of which do and some of which do not charge admissions. From South Chicago to Highland Park, Illinois, there are 15 Lake Michigan bathing beaches operated by private persons for profit, of which nine charge admissions and six are operated by hotels and clubs, for the use of their patrons,

residents, and members, without any express or specific admission charge. (R. 43.)

On July 24, 1941, the Collector of Internal Revenue notified petitioner to collect an admission tax on all bathing beach tickets sold on and after July 25, 1941. Petitioner did not, during the year 1941 or in any prior years, collect from purchasers who paid admissions to its bathing beach facilities any amount to cover the admissions tax alleged to have been imposed by the Admissions Tax Act.[1] (R. 43.)

Subsequently, the Commissioner of Internal Revenue assessed and collected from petitioner, under the provisions of Sections 1700 and 1718 of the Internal Revenue Code, admissions tax on the amounts paid as admissions to petitioner's bathing beach from July 25, 1941, to October 1, 1941, and during the years 1942 through 1945. Petitioner filed timely claims for refund, which were rejected, and this suit was begun. (R. 43-44.)

The District Court entered judgment in favor of petitioner for refund of the tax paid.[2] (R. 45.)

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[1] A stipulation filed in the Court of Appeals on February 2, 1949 (R. 62), states that—

> the Wilmette Park District did not during the years 1942, 1943, 1944 or 1945 collect from purchasers who paid admissions to its bathing beach facilities any amount to cover the admissions tax alleged to have been imposed by the Admissions Tax Act (53 Stat. 189, as amended, c. 10, Title 26, U.S.C.A., Sec. 1700).

[2] The judgment did not include refund of the amount of tax paid for 1941, that amount having been paid to respondent's predecessor. (R. 26.)

The Court of Appeals for the Seventh Circuit reversed. (R. 63-69.)

ARGUMENT

1. The question whether Congress intended the admission tax to apply to charges for the use of public beach facilities, does not, in the absence of a conflict of decisions, require further review. Section 1700 of the Internal Revenue Code (Appendix, *infra*, p. 13) imposes a tax upon "the amount paid for admission to any place, including admission by season ticket or subscription". See also Section 1704 (Appendix, *infra*, p. 13). Contrary to petitioner's argument (Pet. 16-18), no question of Congressional intent is presented by the fact that in the present case use of the bathing beach facilities was included in the charge on which the tax was levied. The charge was plainly for admission to the bathing beach and thus is covered by the statute.[3] Nor is any question of construc-

[3] Petitioner "makes a charge to all persons for admission to the bathing beach" (Stip., R. 12) and, as the court below stated (R. 65-66), the beach facilities cannot be used until entrance is made by payment of the admission charge and "the person after entering the place has the option of using the facilities or not as such person sees fit". Thus, the court below was correct in concluding (R. 65) that the charge made by petitioner "comes squarely within the statutory definition" of a charge paid for admission "to any place", as well as within the provisions of Sections 101.2 and 101.3 of Treasury Regulations 43 (Appendix, *infra*, pp. 14-17), which, among other things, define the phrase "to any place" as meaning a definite enclosure or location. See also Section 101.4, Treasury Regulations 43 (Appendix, *infra*, p. 17).

A charge is no less an admission charge because it also includes use of the place or of facilities contained in the place to which admission is charged. *Exmoor Country Club* v.

tion raised by the fact that the charge involved here was made by a local governmental agency. Petitioner's argument is that, since Congress did not explicitly state that the tax applies to admissions charged by States or State agencies, the statute should be construed as inapplicable to such admission charges. Petitioner's reliance on certain language in the concurring opinion of Mr. Justice Rutledge in *New York* v. *United States*, 326 U. S. 572, 585, is misplaced. A contrary rule of construction was applied in that case, and in his concurring opinion Mr. Justice Rutledge recognized (p. 586) that in previous cases the Court had applied the contrary rule and in at least one case made a ruling to that effect. See also, *South Carolina* v. *United States*, 199 U.S. 437; *Ohio* v. *Helvering*, 292 U. S. 360; and *Allen* v. *Regents*, 304 U.S. 439.

United States, 119 F. 2d 961 (C.A. 7th); *Twin Falls Natatorium* v. *United States*, 22 F. 2d 308 (D. Idaho); see also, *Chimney Rock Co.* v. *United States*, 63 C. Cls. 660, certiorari denied, 275 U. S. 552. Petitioner's argument to the contrary (Pet. 16-18) is based upon unsupported assertions that the admission tax has not been levied on charges made for the use of certain facilities, such as tennis courts, ice skating facilities, etc., under circumstances which petitioner does not explain. Whether the admission tax is applicable in any given case depends upon the circumstances of the case. For example, despite petitioner's assertion that the tax is not levied on the use of ice skating facilities, it has been held that charges paid for the use of a swimming pool or skating rink, to which admission was denied except upon payment of the charge, are subject to the admission tax. *Exmoor Country Club* v. *United States, supra; Twin Falls Natatorium* v. *United States, supra.* On the other hand, where free access to and use of a place is allowed and a charge is made only for rental or services, the charge is not subject to the admission tax. See Treasury Regulations 43, Section 101.2.

Moreover, the rule of construction urged by petitioner cannot properly be applied in this case. In *Allen* v. *Regents, supra,* the tax imposed on charges for admission "to any place" was held to apply to admission charges to football games conducted by a state agency. Section 101.16 of Treasury Regulations 43, as amended (Appendix, *infra,* p. 18), has since 1942 provided that admission charges are not exempt from the tax[4] by the fact that the authority charging the admission is a state or political subdivision thereof.[4] Since Congress has not amended Section 1700 to provide such an exemption, the interpretation of the statute reflected by Section 101.16 of the Regulations and by *Allen* v. *Regents, supra,* which was decided in 1938, must be taken to be correct. *Helvering* v. *Winmill,* 305 U.S. 79, 83.

2. The decision below raises no important constitutional questions requiring decision by this Court. The assertions are based on a twofold ar-

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[4] In view of the express provisions of Section 101.16 of the Regulations, it is obvious that there is no merit in petitioner's assertion (Pet. 19-20) that certain provisions of Section 101.2 of the Regulations tend to support the exemption. The provisions petitioner relies upon are quoted in the Appendix, *infra,* pp. 15-16, and relate only to amounts paid to become regularly entitled to the privileges of a club or other organization—amounts which, as the Regulations indicate, may be subject to the altogether different tax imposed upon dues and membership fees by Section 1710(a)(1) of the Code (26 U.S.C. 1946 ed., Sec. 1710). Moreover, petitioner's argument in this connection relates only to the season tickets it issued and the statute itself imposes the tax upon amounts paid for admission to any place, "including admission by season ticket or subscription".

gument, first, that the imposition of the tax in this case "is an unconstitutional burden on a State activity which is immune from Federal taxation" (Pet. 7) and, second, that "The Federal Government has no power to infringe the sovereignty of a local government by imposing a penalty which can only be paid out of its general funds" (Pet. 15) when, as here, it refuses to collect the tax.

The first argument, as the court below stated (R. 67), is answered and controlled by *Allen* v. *Regents*, 304 U. S. 439, where it was held that the admission tax applies to charges for football games conducted by a state agency. That holding was made despite the fact that the funds derived from the games were used in aid of necessary governmental functions (p. 452) and despite the assumption that the holding of athletic contests "is an integral part of the program of public education conducted by Georgia" and thus is a "governmental function" (p. 449). The important fact, the Court stated in that case (p. 452), was that the state, in order to raise funds in support of its education system (which, in the case of the University of Georgia, included the repayment of loans obtained to build the stadium) had embarked on a business having the incidents of similar enterprises usually prosecuted for private gain. The operation of a bathing beach is a business which is often (see R. 13), if not usually, prosecuted for private gain, and is as much of a "business" as the holding of athletic contests.

Nor is petitioner's argument supported by *New York* v. *United States*, 326 U. S. 572. The tax here does not discriminate against the States, and thus appears to satisfy the test laid down in the opinion of Mr. Justice Frankfurter (pp. 573-584) in which Mr. Justice Rutledge joined. Under the principles declared in Mr. Chief Justice Stone's concurring opinion (pp. 586-590), immunity would be accorded only for a tax which unduly interferes with the State's performance of a sovereign function of government. No undue interference with a sovereign function of government was found in that case, where the question was whether the State of New York is immune from the federal tax on the sale of mineral water. Similarly, the collection of the admission tax in this case would seem clearly not to interfere unduly with a sovereign function of government. Even if the maintenance of a bathing beach is regarded as a "sovereign function" of government, the collection of a tax on the charge made by petitioner for admission to the beach, a tax which is payable by the persons seeking admission, is not an undue interference with the operation or maintenance of the beach or with the furnishing of bathing facilities to the public.[5]

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[5] Petitioner points to the statement in the concurring opinion in *New York* v. *United States*, *supra*, to the effect that a real estate tax on public parks cannot constitutionally be imposed (Pet. 11), but a real estate tax upon the state itself is quite different from an admission tax payable by members of the public seeking admission to a bathing beach.

While it may be that the tax in this case has been or will ultimately be paid from petitioner's general funds by reason of petitioner's refusal to collect the tax after notice to do so, that fact raises no important constitutional question. Section 1715 (a) of the Code (Appendix, *infra*, pp. 13-14) placed on petitioner the duty of collecting the tax from the persons seeking admission to the beach. The imposition of that duty on a local agency of a state is constitutional. *Allen* v. *Regents*, 304 U. S. 439. For failure to collect the tax, petitioner is subject under Section 1718 (Appendix, *infra*, p. 14) to a penalty in the amount of the tax which it failed to collect. Since the imposition of the obligation to collect the tax is constitutional, the imposition of a penalty, being a sanction to obtain performance, is also constitutional. As the court below stated (R. 68), "To permit plaintiff to escape its obligation because its elected officials refused to perform their statutory duty would in effect nullify the statute". Thus, contrary to petitioner's contention (Pet. 15), no question of infringement of its sovereignty is involved. See *Allen* v. *Regents*, *supra*. Petitioner's liability for payment of the tax results only from the wrongful act of its officials in refusing to collect the tax. The effect of the wrongful act may be of concern as between petitioner and the officials who wrongfully refused to collect the tax, but it raises no constitutional question. Nor is any constitutional question raised by petitioner's argument (Pet. 15) that it is immune

from such process as a sheriff's levy and a collector's distraint levy. No such process was issued. This is a suit for refund of a tax which taxpayer has paid.

CONCLUSION

The decision below is correct and presents no important question. There is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.
THERON LAMAR CAUDLE,
Assistant Attorney General;
ELLIS N. SLACK,
MELVA M. GRANEY,
Special Assistants to the Attorney General.

JUNE, 1949.

Internal Revenue Code:

SEC. 1700. TAX.

There shall be levied, assessed, collected, and paid—

(a) *Single or Season Ticket; Subscription.*—

(1) *Rate.*—A tax of 1 cent for each 10 cents [6] or fraction thereof of the amount paid for admission to any place, including admission by season ticket or subscription * * *.

(2) *By whom paid.*—The tax imposed under paragraph (1) shall be paid by the person paying for such admission.

* * * * *

(26 U.S.C. 1946 ed., Sec. 1700.)

SEC. 1704. ADMISSION DEFINED.

The term "admission" as used in this chapter includes seats and tables, reserved or otherwise and other similar accommodations, and the charges made therefor.

(26 U.S.C. 1946 ed., Sec. 1704.)

SEC. 1715. PAYMENT OF TAX.

(a) *Collection by Recipient of Admissions, Dues, and Fees.*—Every person receiving any payments for admissions, dues, or fees, subject to the tax imposed by section 1700 or 1710 shall collect the amount thereof from the per-

[6] Section 302 of the Revenue Act of 1943, c. 63, 58 Stat. 21, changed the rate to 1 cent for each 5 cents or major fraction thereof.

son making such payments. Every club or organization having life members shall collect from such members the amount of the tax imposed by section 1710.

* * * * *

(26 U.S.C. 1946 ed., Sec. 1715.)

SEC. 1718. PENALTIES.

* * * * *

(c) Any person who willfully fails to pay, collect, or truthfully account for and pay over, any tax imposed by this chapter, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty of the amount of the tax evaded, or not paid, collected, or accounted for and paid over, to be assessed and collected in the same manner as taxes are assessed and collected. No penalty shall be assessed under this subsection for any offense for which a penalty may be assessed under authority of section 3612.

* * * * *

(26 U.S.C. 1946 ed., Sec. 1718.)

Treasury Regulations 43 (1941 ed.):

Sec. 101.2 *Meaning of "Admission."*—The tax is imposed on "the amount paid for *admission* to any place," and applies to the amount which *must be paid* in order to gain admission to a place. (See section 101.4.) The term "admission" means the right or privilege to enter into a place. The law specifically pro-

vides that it shall also include "seats and tables, reserved or otherwise and other similar accommodations." A charge for their use in any place must, therefore, be treated as a taxable charge for admission. So an amount paid for the right to use a reserved seat in a theater or circus, a seat in a room or window to view a parade, or the like, is taxable. This is true whether the charge made for the use of the seat, table, or similar accommodation is combined with an admission charge proper to form a single charge, or is separate and distinct from an admission charge, or is itself the sole charge. The tax under section 1700(a) as amended does not apply, however, to admissions to or charges for seats and tables in a cabaret, roof garden, or similar place which are subject to the provisions of section 1700 (e) of the Code as amended. (See sections 101.13 and 101.14.)

* * * * *

The amount paid for admission by season ticket is a fixed sum which entitles the holder to admission on definite dates to a series of scheduled attractions, or to admission at all times during the season, and the form of the ticket is not controlling.

* * * * *

An amount paid to become regularly entitled to the privileges of a club or other organization, as member or otherwise, is not an "amount paid for admission" even though one of the privileges be the right to enter a clubhouse, club grounds, gymnasium, swimming

pool, or the like. But where the chief or sole privilege of a so-called membership is a right of admission to certain particular performances or to some place on a definite number of occasions (as contrasted with a more or less unlimited right to enter a clubhouse or other place as many times as desired during a year or some other period), then the amount paid for such so-called membership is an "amount paid for admission" within the meaning of the Code. An entirely different tax is levied on amounts paid as initiation fees or as dues or membership fees to certain classes of clubs or organizations, and also upon life members of such clubs, by section 1710 of the Code. (See Subpart F.)

* * * * *

If a charge imposed on a person admitted to a place is designated as an admission it will be presumed that it is in fact an admission charge, even though it includes rental of property or services, such, for example, as a charge of 50 cents for admission to a swimming pool, including use of a suit. The tax will apply in such case unless it is clearly shown that the charge is for rental or services, and that persons who do not use the property or services offered (e.g., use of a swimming suit) are admitted free. On the other hand, the designation of a charge as a rental or service charge (e.g., a charge for use of a swimming suit) will not avoid the application of the tax if it in fact represents a charge for admission, or includes the right to admission. If the same charge is made to the person using or furnish-

ing his own property or equipment, as where property or equipment is furnished by the management, such charge is an amount paid for admission and subject to tax. If a lesser charge is made to persons who do not desire to use the property or services offered, the lesser charge represents the admission charge.

Sec. 101.3 *Meaning of the Term "Place."* —The tax under section 1700(a) of the Code is on the amount paid for admission *to any place.* "Place" is a word of very broad meaning, and it is not defined or otherwise limited by the Code. But the basic idea it conveys is that of a definite inclosure or location. The phrase "to any place," therefore, does not narrow the meaning of the word "admission," except to the extent that it implies that the admission is to a definite inclosure or location. The inclosure or location may be on, above, or beneath the surface of the earth. Places of amusement obviously constitute the most important class of places admission to which is subject to this tax.

Sec. 101.4 *Basis, Rate, and Computation of tax.*—* * *

The tax applies whether any profit is contemplated or realized and whether the affair to which admission is charged is public or private.

* * * * *

The amount paid for admission to any place is the amount which must be paid to the person or persons controlling such admission in order to secure the privilege. * * *

Sec. 101.16 [as amended by T.D. 5170, 1942-2 Cum. Bull. 246] *Admissions by or for the Benefit of Federal, State, or Municipal Governments.*—The fact that the authority charging admissions or receiving the proceeds thereof is the United States or an agency thereof, or a State or Territory or political subdivision thereof, such as a county, city, town, or other municipality, does not make such admissions exempt. For exception see section 101.15(b). The Code specifically provides that the taxes on admission shall be paid by the person paying for admission. It is not, therefore, a tax on the person or authority selling the admissions or receiving the proceeds thereof.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 75

WILMETTE PARK DISTRICT, PETITIONER

v.

NIGEL D. CAMPBELL, COLLECTOR OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion, findings of fact and conclusions of law of the District Court (R. 25-27, 41-44) are reported at 76 F. Supp. 924. The opinion of the Court of Appeals (R. 63-69) is reported at 172 F. 2d 885.

JURISDICTION

The judgment of the Court of Appeals was entered on February 23, 1949. (R. 69.) Petition for re-

hearing was denied March 18, 1949. (R. 70.) The petition for a writ of certiorari was filed May 18, 1949, and granted on June 20, 1949. The jurisdiction of this Court rests upon 28 U.S.C., Sec. 1254.

QUESTIONS PRESENTED

1. Whether the amounts received by petitioner from its bathing beach patrons were amounts paid "for admission" within the meaning of Section 1700 (a) (1) of the Internal Revenue Code.

2. Whether Section 1700 (a) (1) of the Code should be construed as exempting from tax the admission charges received by a state instrumentality.

3. Whether the doctrine of state immunity from federal taxation is a constitutional barrier to collection of tax on the admissions received by petitioner from its bathing beach patrons.

4. Whether the amount of the tax due for the years 1942, 1943 and 1944 was properly collected from petitioner under Section 1718 of the Code as penalties for failure to collect the tax from its bathing beach patrons during those years.

STATUTE AND REGULATIONS INVOLVED

The pertinent statute and Treasury Regulations are set forth in the Appendix, *infra,* pp. 37-44.

STATEMENT

The essential facts found by the District Court (R. 41-44), taken principally from the stipulation of facts (R. 11-14), are as follows:

Petitioner, the Wilmette Park District, is a body politic and corporate organized in 1908 under the provisions of a statute of the State of Illinois approved June 24, 1895, entitled "An Act to provide for the Organization of Park Districts and the transfer of submerged lands to those bordering on navigable bodies of water" (Illinois Revised Statutes (1945), c. 105, pars. 256 through 295). Pursuant to the provisions of such statute, petitioner is administered by a Board of Commissioners elected by the people residing in the District. The respondent, Nigel D. Campbell, has been the Collector of Internal Revenue for the First District of Illinois since January 1, 1945. (R. 41.)

The Wilmette Park District consists of an area of approximately 2.8 square miles located within the incorporated area of the Village of Wilmette, Cook County, Illinois, a village which has a population of approximately 20,000 and was organized and exists under and by virtue of Chapter 24 of the Illinois statutes. Included within the Wilmette Park District are four park areas aggregating approximately .78 square miles. The largest park area, known as Washington Park, extends along the shore of Lake Michigan for approximately three-fourths of a mile. The land area of Washington Park was acquired partly by grant from the State of Illinois, partly by purchase and partly by the exercise of the right of eminent domain. (R. 41-42.)

For more than 25 years, petitioner's riparian property at the north end of Washington Park and

along the shoal waters of Lake Michigan adjacent thereto has been used as a bathing beach during the summer months. The bathing beach is controlled, maintained and operated solely by petitioner. It is used principally by residents of the Wilmette Park District, but its facilities are also utilized by nonresidents. (R. 42.) During the years 1941 through 1944, petitioner supplied the following services and facilities for use in conjunction with the bathing beach: A bath house containing clothing lockers, toilets and wash rooms; an automobile parking area; life saving equipment; flood lighting, drinking fountains; showers; spectator benches; bicycle racks; first aid personnel; and supplies. In connection with the operation and maintenance of the bathing beach, petitioner employs a beach superintendent, a secretary, beach maintenance labor, life guards, check room and gate check workers, general office workers and policemen. (R. 42.)

Petitioner makes two types of charges to users of the beach and beach facilities: (1) a flat rate for a season ticket issued on either an individual or family basis, and (2) a single daily admission charge of 50 cents on week days and $1 on Saturdays, Sundays and holidays, for which no tickets are issued. The charge made by petitioner for the use of the beach and beach facilities is made to cover maintenance, operation and some capital improvements. Over the years the charge is intended merely to approximate these costs, and not to pro-

duce net income or profit to petitioner. (R. 42-43.)

From Gary, Indiana, to Lake Bluff, Illinois, there are 29 municipally operated bathing beaches, some of which do and some of which do not charge admissions. From South Chicago to Highland Park, Illinois, there are 15 Lake Michigan bathing beaches operated by private persons for profit, of which nine charge admissions and six are operated by hotels and clubs, for the use of their patrons, residents, and members, without any express or specific admission charge. (R. 43.)

On July 24, 1941, the Collector of Internal Revenue notified petitioner to collect an admission tax of 10 percent on all bathing beach tickets sold on and after July 25, 1941. Petitioner did not, during the year 1941 or in any prior years, collect from purchasers who paid admissions to its bathing beach facilities any amount to cover the admissions tax alleged to have been imposed by the Admissions Tax Act.[1] (R. 43.)

Subsequently, the Commissioner of Internal Revenue assessed and collected from petitioner, under the provisions of Sections 1700 and 1718 of the Internal Revenue Code, penalties in the amount of the tax on the amounts paid as admissions to petitioner's bathing beach from July 25, 1941, to

[1] A stipulation filed in the Court of Appeals on February 2, 1949 (R. 62), states that—

> the Wilmette Park District did not during the years 1942, 1943, 1944 or 1945 collect from purchasers who paid admissions to its bathing beach facilities any amount to cover the admissions tax alleged to have been imposed by the Admissions Tax Act (53 Stat. 189, as amended, c. 10, Title 26, U.S.C.A., Sec. 1700).

October 1, 1941, and during the years 1942 through 1945, with interest. Petitioner filed timely claims for refund, which were rejected, and this suit was begun. (R. 43-44.)

The District Court entered judgment in favor of petitioner for refund of the tax paid.[2] (R. 45.) The Court of Appeals for the Seventh Circuit reversed. (R. 63-69.)

SUMMARY OF ARGUMENT

1. Section 1700 (a) (1) of the Internal Revenue Code imposes a tax upon "the amount paid for admission to any place." Petitioner charged all persons for admission to its bathing beach and the tax involved here was on amounts paid for admission to the beach. The charge made by petitioner was therefore an admission charge and not, as petitioner contends, a charge for use of bathing beach facilities. The fact that the admission charge entitled patrons to use the beach facilities is immaterial under long-standing Treasury Regulations which recognize that an admission charge may include use of a place or of the facilities in it and which distinguish between an admission charge and a use charge, or amount paid for rental of property or services. Since Congress has not amended the statutory language, the interpretation thereof contained in the Treasury Regulations must be

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[2] The judgment did not include refund of the amount of tax paid for 1941, that amount having been paid to respondent's predecessor. (R. 26.)

taken to be correct. The fact that petitioner did not operate the beach for profit in the ordinary sense does not of course change the nature of the charge made by petitioner.

2. The admission fees received by petitioner are not exempt from tax under Section 1700 (a)(1) on the ground that Congress did not intend the tax to apply to admissions charged by state instrumentalities. It is immaterial that the statute does not specifically state that it applies to admissions charged by States and state instrumentalities. The statute imposes the tax on admissions paid "to any place." This Court has consistently applied the rule that States and state instrumentalities are included within the broad language of a taxing statute. No affirmative intent to exclude them from the operation of Section 1700 (a)(1) can be drawn from the fact that prior to 1941 an exemption was provided for admissions the proceeds of which inured to the exclusive benefit of a society or organization conducted for the sole purpose of improving any city, village or other municipality. That exemption was repealed in 1941 and is not applicable to the taxable years involved here. Moreover, petitioner is not a society or organization; it is a state instrumentality and the Congressional intent with respect to state instrumentalities, including municipalities and political subdivisions of a State, is clear. The Treasury Regu-

lations interpreting the taxing statute have since 1919 provided that admissions charged by States, municipalities, political subdivisions of a State, etc., are not exempt from tax. Since Congress has not amended the statutory language, this interpretation, like that as to the nature of an admission charge, must be taken to have received Congressional approval.

3. The doctrine of State immunity from federal taxation is not a constitutional barrier to the collection of tax on the admissions charged by petitioner. At most, the immunity doctrine applies only if (1) the tax is imposed with respect to an activity which is of an immune type and if (2) the tax also imposes an undue burden upon petitioner.

(a) The tax does not impose an undue burden upon petitioner, and that fact is a complete answer to petitioner's constitutional arguments. An undue burden is one which is actual, substantial and tangible, as distinguished from conjectural, uncertain, remote, indirect or incidental. The admission tax is laid upon the persons paying the admissions, not on petitioner. The tax affects petitioner only in that, because of the resulting increase in cost of admission to the bathing beach, there is a remote possibility that petitioner's revenue from the beach will be reduced and, because of that, increase petitioner's cost of operating the beach. The possibility of increased cost to peti-

tioner is not a constitutionally prohibited burden under decisions of this Court.

(b) If the tax be regarded as imposing a direct burden upon petitioner, the immunity doctrine still does not apply. A direct federal tax may be imposed upon a State in connection with an activity which is of a type not immune from federal taxation because of its nature. Petitioner's operation of the bathing beach was not an immune activity. The activity constituted a business—that of furnishing bathing beach facilities for an admission fee. The business is one which may be and is extensively carried on by private individuals. It is not a business whose conduct is uniquely or traditionally a state function or is necessary to the preservation of a State. To grant it immunity would be to withdraw a taxable activity from the reach of federal taxation. No such result is required by the decisions of this Court. It is immaterial that the State may have deemed the activity one conducted for the public benefit or that it was conducted from a public park and not for profit in the ordinary sense.

Petitioner's argument on this point rests on the erroneous assumption that the activity involved consists of the maintenance of public parks. True, the proceeds from the business were devoted to the maintenance of the bathing beach, but that fact is immaterial and does not in any event change the nature of the activity.

4. The fact that petitioner is a state instrumentality does not relieve it from paying the amount of the tax for the years 1942, 1943 and 1944 as a penalty imposed by Section 1718 of the Code for willful failure to collect the tax from its bathing beach patrons. The imposition of the tax as applied to the admissions petitioner received from its bathing beach patrons was a valid exercise of the taxing power of the Federal Government. The provisions for enforcement of the tax—including the requirement that the tax be collected by the person receiving the admissions and the imposition of a penalty in the amount of the tax for willful failure to collect the tax—are means appropriately adapted to enforce the collection of the tax. Petitioner points to no constitutional provision or implication to justify a conclusion that state sovereignty transcends the enforcement of a valid federal tax. The Tenth Amendment does not support such a conclusion. The laws enacted by Congress within a granted power are the supreme law of the land and the sovereign power of the states is necessarily diminished to the extent of the grants of power to the Federal Government in the Constitution. Moreover, since the operation of the bathing beach was not an activity which is immune from federal taxation, petitioner would not be exempt from payment of the penalty provided by Section 1718 even if the penalty were treated as an admission tax imposed directly upon the State.

ARGUMENT

I

The tax was collected on amounts paid to petitioner "for admission" within the meaning of Section 1700(a)(1) of the Internal Revenue Code

Section 1700(a)(1) of the Internal Revenue Code (Appendix, *infra*, p. 37) imposes a tax upon "the amount paid for admission to any place, including admission by season ticket or subscription * * *." The pertinent Treasury Regulations state that the word "admission" means the right or privilege to enter into a place and that "place" implies the idea of a definite inclosure or location. Treasury Regulations 43 (1941 ed.), Secs. 101.2 and 101.3, Appendix, *infra*, pp. 40-43. In the present case it was stipulated that petitioner "makes a charge to all persons for admission to the bathing beach" (par. 8, R. 12) and that the tax assessed by the Commissioner and paid by petitioner for the years 1942, 1943 and 1944 was "on the amounts pair as admissions to the bathing beach" (par. 16, R. 14).[3] Thus, as the court below held (R. 65), the tax here involved was paid upon amounts which were clearly received as "admission" charges within the meaning of Section 1700(a)(1) and of the pertinent Treasury Regulations.

Petitioner seems to contend that the tax imposed by Section 1700(a)(1) should be limited in its ap-

[3] Tax in the amount of $57.20 on amounts paid as admissions after July 25, 1941, was paid to respondent's predecessor in office and for that reason is not involved here. (R. 26.)

plication to charges for entry to places furnishing entertainment to be seen or heard—that a charge for entry to a place which is subject to use, such as a bathing beach or swimming pool, is a use charge and therefore not taxable under Section 1700(a)(1).[4] (Br. 9-17.) The statute, however, imposes the tax upon the amount paid for admission to "any" place.[5] The fact that the place can be used by persons paying the admission charge does not transform the charge into a use charge. See *Exmoor Country Club* v. *United States*, 119 F. 2d 961 (C.A. 7th); *Twin Falls Natatorium* v. *United States*, 22 F. 2d 308 (D. Idaho); see also, *Chimney Rock Co.* v. *United States*, 63 C. Cls. 660, certiorari denied, 275 U. S. 552. Use of the place or of facilities contained in a place to which admission is charged is generally included to some extent in any admission charge. For example, a theatre patron paying an admission charge will ordinarily sit in a seat provided by the management. A person paying an admission charge to a swimming pool will

[4] As both the District Court and the court below noted (R. 26, 66), petitioner did not originally contend that the charge was not for admission to the bathing beach. Petitioner's amended complaint sought recovery of the tax only on constitutional grounds (R. 6) and referred to "The fee charged by plaintiff for admission to the bathing beach," to the "admissions" collected, and twice to the "admission tickets" sold by petitioner (R. 5). However, both the District Court and court below passed upon the question whether the charge made by petitioner was a charge for admission. The court below held that it was (R. 65-66), whereas the District Court had held that it was not (R. 26).

[5] The tax thus applies as well to fees incident to admission to national parks. See Sec. 541(c), Revenue Act of 1941, c. 412, 55 Stat. 687.

both enter and use the pool at the same time. Ever since the tax upon amounts paid for admission "to any place" was first imposed in 1917,[6] the pertinent Treasury Regulations have recognized that an admission charge within the meaning of the statute may include use of the place or of facilities contained therein. The Regulations have also drawn a distinction between a use charge, or rental for property or services, and an admission charge. Generally speaking, the distinction was based on whether the charge was made to *all* persons. If made to all persons for the right or privilege of entering a definite location, the charge was regarded as an admission charge, as it clearly is; if made only for rental of property or services, with persons who did not use the property or services being accorded free access to the place, the charge was deemed to be one for the rental of property or services and not covered by the statute.[7] This in-

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[6] The tax was first imposed by Section 700 of the Revenue Act of 1917 (c. 63, 40 Stat. 300), and was continued in Section 800 (a) of the Revenue Acts of 1918 (c. 18, 40 Stat. 1057) and of 1921 (c. 136, 42 Stat. 227); Section 500 (a) of the Revenue Acts of 1924 (c. 234, 43 Stat. 253) and of 1926 (c. 27, 44 Stat. 9); and Section 1700 (a) of the Internal Revenue Code.

[7] Treasury Regulations 43 (1919 ed. and 1921 ed. (Part 1)), Arts. 5, 8, 9 and 10; Treasury Regulations 43 (1922, 1924 and 1926 eds. (Part 1)), Arts. 2, 3 and 4; Treasury Regulations 43 (1928 and 1932 eds.), Arts. 2 and 3; Treasury Regulations 43 (1941 ed.), Secs. 101.2 and 101.3, Appendix, *infra*, pp. 40-43. Even the very first Treasury Regulations on the subject, Treasury Regulations 43 (1918 ed.), which were not as detailed as those which followed, stated in Article IV that—

> The test, therefore, to determine whether the tax is due on admissions is whether all persons admitted must pay a charge or only those who use the equipment.

terpretation of the statutory language must be taken as correct, for it may be presumed that Congress would have amended the statutory language had it intended a different interpretation. *Helvering* v. *Winmill*, 305 U. S. 79, 83. Accordingly, the question whether a charge is for admission or is a use or rental charge depends upon the facts of the particular case.[8] No charge for rental of property or services is involved in the present case. The charge made by petitioner was made to all persons for admission to the beach without reduction in the charge if the person admitted did not make use of any or all of the property and services furnished by petitioner. Accordingly, the charge was necessarily an admission charge.[9] See Sec. 101.2, Treasury Regulations 43 (Appendix, *infra*, pp. 40-43).

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[8] For this reason it is futile for petitioner to assimilate its charge for admission to its bathing beach to other types of charges which are not taxed. The charge for use of a tennis court, for example, is not taxed because it is a rental charge, being paid for the exclusive use of the court for a limited time. See Treasury Regulations 43 (1919 ed. and 1921 ed. (Part 1)), Art 10; Treasury Regulations 43 (1922 and 1924 eds. (Part 1)), Art. 4; Treasury Regulations 43 (1926 ed. (Part 1)), Art. 3.

[9] Analogously, the following have been specifically recognized in prior Treasury Regulations as charges for admission: The charge for admission to a swimming pool or to a building or enclosure in which a swimming pool is located (Treasury Regulations 43 (1919 ed.), Art. 10; Treasury Regulations 43 (1924 ed. (Part 1)), Art. 4; Treasury Regulations 43 (1926 ed. (Part 1)), Art. 3; the charge for admission to a roller skating or ice skating rink (Treasury Regulations 43 (1919 ed.), Art. 10; Treasury Regulations 43 (1922 and 1924 eds. (Part 1)), Art. 4; Treasury Regulations 43 (1926 ed. (Part 1)), Art. 3; the charge for going out on a fishing pier where the charge covers use of fishing tackle but must be paid whether or not the fishing tackle is used (Treasury Regulations 43 (1919 ed. and 1921 ed. (Part 1)), Art. 10; Treasury Regulations 43 (1922 and

Petitioner also seems to contend that the charge it made was not an admission charge because petitioner had no profit motive in making the charge. (Br. 11-12.) The District Court adopted a similar view, stating that, while the charge to a public bathing beach operated for profit would be a charge for admission within the meaning of Section 1700, petitioner was in fact levying a use tax in making a charge which brought in approximately enough revenue to cover the cost of operation.[10] (R. 26.) The court below correctly rejected that view. The nature of a charge depends upon what is offered to and received by the patron in return for payment of the charge, not upon the motive for making the charge. The pertinent Treasury Regulations state that "The tax applies whether any profit is contemplated or realized and whether the affair to which admission is charged is public or private." Treasury Regulations 43 (1941 ed.), Sec. 101.4, Ap-

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1924 eds. (Part 1)), Art. 4; and the single price charge for admission to a dancing school where anyone admitted may dance and receive instruction without further charge (Treasury Regulations 43 (1919 ed. and 1921 ed. (Part 1)), Art. 10).

[10] We do not understand petitioner to contend that the charge it made was a use "tax." In any event it was not. A tax is a demand of sovereignty (*Case of the State Freight Tax*, 15 Wall. 232, 278) and a use tax is an excise tax levied upon the exercise of the privilege of enjoying one's own property, not the property of another (*Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 582; *McLeod* v. *Dilworth Co.*, 322 U. S. 327, 330). Hence, a charge made for the use of public property or services, paid voluntarily by those who avail themselves thereof, is not a tax. See *Carson* v. *Brockton Sewerage Commission*, 182 U. S. 398, 402-403; *Sands* v. *Manistee River Imp. Co.*, 123 U. S. 288, 294; *Packet Co.* v. *Keokuk*, 95 U. S. 80, 84; *Mahler* v. *Commissioner*, 119 F. 2d 869, 873 (C.A. 2d); *Wagner* v. *City of Rock Island*, 61 Ill. App. 583.

pendix, *infra*, pp. 43-44. The decisions are in accord. See *Exmoor Country Club* v. *United States*, 119 F. 2d 961 (C.A. 7th); *Dashow* v. *Harrison* (N.D. Ill.), decided February 8, 1946, unreported (1946 P-H, par. 72,405).

II

Section 1700(a)(1) is not to be construed as exempting from tax admission charges made by a state instrumentality

Petitioner further contends that Section 1700 (a)(1) should be construed as exempting from tax admissions charged by a state instrumentality. (Br. 13-17.) This contention, advanced for the first time on petition for a writ of certiorari, is based on an argument that Congress would have explicitly so stated if it had intended to include state functions as subject to tax. (Br. 13.)

Taxpayer's contention cannot be accepted as a rule of construction. As Mr. Justice Rutledge recognized in his concurring opinion in *New York* v. *United States*, 326 U. S. 572, where he favored such a rule of construction, this Court has consistently applied the contrary rule that States are included under the general wording of a tax statute. See also *Case* v. *Bowles*, 327 U. S. 92, 98-99. Although the point was not raised, the latter rule was applied in *Allen* v. *Regents*, 304 U. S. 439, in which the admission tax was held applicable to admissions to football games conducted by a state instrumentality. Cf. G.C.M. 14407, XIV-1 Cum. Bull. 103 (1935).

Petitioner also argues that a Congressional intent not to tax admissions charged by municipalities is to be drawn from the fact that prior to 1941 an exemption from the admission tax was provided for admissions all of the proceeds of which inured to the exclusive benefit of a society or organization conducted for the sole purpose of improving any city, village or municipality. (Br. 14-16.) This exemption was repealed in 1941 (see Sections 541 (b) and 550 (a) of the Revenue Act of 1941, c. 412, 55 Stat. 687) and was not applicable to the taxable years involved here. Moreover, since it related only to societies and organizations, it cannot be taken to reflect a Congressional intent to exclude States, state instrumentalities, municipalities, etc., from the operation of Section 1700 (a)(1).

The Congressional intent not to exempt admissions charged by States, state instrumentalities, municipalities and political subdivisions of a State is clear. Section 1700 (a)(1) imposes the admission tax on admissions charged "to any place". As already shown (*supra*, p. 13), tax on amounts paid for admission "to any place" was first imposed under the Revenue Act of 1917, and was continued under the Revenue Act of 1918, subsequent Revenue Acts and the Internal Revenue Code. The pertinent Treasury Regulations issued in 1919 (Treasury Regulations 43 (1919 ed.), Art. 42) stated as follows:

> Art. 42. *Admissions charged by State or municipality not exempt.*—The fact that the

authority charging admissions, or receiving the exclusive proceeds thereof, is one of the United States, or a political subdivision thereof, or a municipality, or a State or municipal institution does not make such admissions exempt from tax. Unless exempt on some other ground such admissions are taxable. For, as the Revenue Act of 1918 provides no exemption for such cases, the only basis for such an exemption of admissions charged by public authorities would be the unconstitutionality of legislation taxing a State or its governmental functions. The taxes imposed by section 800 (a)(1), (2), (5), and (6), however, are imposed on the individuals paying for admission, being admitted, or having the right to the use of a box or seat, respectively. These taxes can not be passed on by such individuals to the authority charging admissions to the place, nor can these taxes in any other way directly reduce the proceeds of such admissions. As the taxes are not imposed on, and do not directly reduce the proceeds inuring to, the authority charging admissions, where a State happens to be that authority, they are not taxes on a State. There can be, therefore, no exemption on that ground.

All of the pertinent Treasury Regulations since 1919 have contained similar provisions.[11] In ad-

[11] Treasury Regulations 43 (1921 ed. (Part 1)), Art. 42; Treasury Regulations 43 (1922, 1924 and 1926 eds. (Part 1)), Art. 26; Treasury Regulations 43 (1928 and 1932 eds.), Art. 24; Treasury Regulations 43 (1940 ed.) Sec. 101.27; Treasury Regulations 43 (1941 ed.), Sec. 101.16, Appendix, *infra*, p. 44.

dition, the admission tax was held in 1938 to apply to admission charges to football games conducted by a state agency. *Allen* v. *Regents*, 304 U. S. 439. In view of the fact that Congress has not amended the statutory language despite its consistent interpretation since 1919 as not exempting admission charges made by state instrumentalities, such an interpretation of the statutory language, like that previously noted in another connection (*supra*, pp. 13-14), must be taken as correctly expressing the Congressional intent. *Helvering* v. *Winmill*, 305 U. S. 79, 83.

III

The doctrine of state immunity from federal taxation is not a constitutional barrier to the collection of tax on the admissions charged by petitioner

It is well established that the doctrine of state immunity from federal taxation does not prevent the imposition of all taxes in connection with a state activity. At most, the doctrine affords immunity from tax only if (1) the tax is imposed in connection with a state activity which is immune from federal taxation and (2) the imposition of the tax unduly burdens the state activity. *Helvering* v. *Gerhardt*, 304 U.S. 405, 418, 419-'20, rehearing denied, 305 U. S. 669. As applied to the present case, the admission tax was neither laid upon a state activity which is immune from federal taxation nor did the tax constitute a constitutionally prohibited burden upon a state activity.

A. *The tax may constitutionally be applied to petitioner's operation of the bathing beach irrespective of whether the operation of the beach is an immune activity, for the imposition of the tax does not impose an unconstitutional burden upon petitioner*

Section 1700 (a)(2) of the Code (Appendix, *infra*, p. 37) provides that the admission tax imposed by Section 1700 (a)(1) "shall be paid by the person paying for such admission". When immunity is claimed for a tax on private persons, it must appear that the burden of the tax on the state activity is actual, substantial, and tangible, as distinguished from conjectural, uncertain, remote, indirect or incidental. *Helvering* v. *Gerhardt, supra*, pp. 419-420; *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, 486; *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376, 386-387; *Oklahoma Tax Comm'n* v. *Texas Co.*, 336 U. S. 342, 365; *Liggett & Myers Co.* v. *United States*, 299 U. S. 383, 386; *Trinityfarm Co.* v. *Grosjean*, 291 U. S. 466; *Alward* v. *Johnson*, 282 U. S. 509, 514. If it be true, as we believe, that the admission tax imposed no undue burden upon petitioner, that fact is a complete answer to petitioner's constitutional argument and it is unnecessary for the Court to decide whether the operation of a bathing beach by petitioner was a state activity which is immune from federal taxation.

Petitioner's contention that the admission tax is in the present case an unconstitutional burden on

the operation of a state activity rests on an assertion that the increase in the price of tickets to the bathing beach occasioned by the tax erects a financial barrier between petitioner and the public and frustrates petitioner's objective of providing bathing beach facilities for the use of the general public. (Br. 21-22.) There can be no doubt that the provision requiring payment of the tax by the person paying the admission places the legal incidence, or the first impact, of the tax upon the admittees to petitioner's bathing beach and that petitioner's argument is based upon an asserted secondary impact of the tax. Moreover, it is highly conjectural to assume that attendance at the bathing beach would be diminished by the necessity of paying the admission tax. There is no showing that purchasers of 50-cent single admission tickets are likely to be deterred by the imposition of an additional 5- or 10-cent tax.[12] Similarly, persons desiring to purchase season tickets would not be likely to feel they could not afford the difference between $2 and $2.20 or $2.40. But, in any event, the tax does not create a barrier between the citizen and the benefit the State has undertaken to supply. If a barrier existed at the admission price plus tax, it could be dissipated by a reduction in the price of admission. A reduction in the prices of admission might reduce petitioner's revenue from the bathing beach and in turn

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[12] By Section 302 of the Revenue Act of 1943, c. 63, 58 Stat. 21, the rate of tax was changed from 1 cent for each 10 cents to 1 cent for each 5 cents of the amount paid for admission.

indirectly increase its cost of maintaining the bathing beach. However, the possibility of increased cost to petitioner is not a ground for immunity from tax. *Helvering* v. *Gerhardt,* 304 U. S. 405, 421, and cases there cited; *James* v. *Dravo Contracting Co.,* 302 U. S. 134, 160. As the Court stated in *Helvering* v. *Gerhardt, supra,* pp. 421-422:

> The basis upon which constitutional tax immunity of a state has been supported is the protection which it affords to the continued existence of the state. To attain that end it is not ordinarily necessary to confer on the state a competitive advantage over private persons in carrying on the operations of its government. There is no such necessity here, and the resulting impairment of the federal power to tax argues against the advantage. The state and national governments must co-exist. Each must be supported by taxation of those who are citizens of both. The mere fact that the economic burden of such taxes may be passed on to a state government and thus increase to some extent, here wholly conjectural, the expense of its operation, infringes no constitution immunity. Such burdens are but normal incidents of the organization within the same territory of two governments, each possessed of the taxing power.

The alleged burden of the admission tax on petitioner's operation of the bathing beach is as remote and conjectural as was the sales tax in *Alabama* v. *King & Boozer,* 314 U. S. 1, upon the United

States, and the manufacturer's excise tax in *Liggett & Myers Co.* v. *United States*, 299 U. S. 383, upon the State. It therefore furnishes no basis for immunity from the tax.

B. *Petitioner's operation of the bathing beach is not a state activity which is immune from federal taxation*

Assuming that the admission tax imposed a direct burden upon petitioner, it does not necessarily follow that the tax is constitutionally uncollectible. A federal tax may be imposed directly upon a State or a state instrumentality provided the activity with respect to which it is imposed is not of a type which is constitutionally immune from federal tax. Under the decisions of this Court, petitioner's operation of the bathing beach was not an immune activity.

The most pertinent decision is *Allen* v. *Regents*, 304 U. S. 439, in which the Court rejected constitutional objections and upheld collection of the admission tax on admissions charged to football games conducted by the Regents of the University System of Georgia, an instrumentality of the State having control and management of the University of Georgia and the Georgia School of Technology. The games were a means of procuring substantial aid for the schools' programs of athletics and physical education. (P. 451.) For the purposes of the case, the Court also assumed (pp. 449-450) that the games were an integral part of the program of

public education conducted by the State of Georgia; that public education is a governmental function; and that the tax was imposed directly upon the state activity and directly burdened that activity. Decision was placed upon the nature of the activity. The question in the case was stated to be (p. 451)—

> whether, by electing to support a governmental activity through the conduct of a business comparable in all essentials to those usually conducted by private owners, a State may withdraw the business from the field of federal taxation.

In answer, the Court stated (pp. 451-452):

> When a State embarks in a business which would normally be taxable, the fact that in so doing it is exercising a governmental power does not render the activity immune from federal taxation. * * *
>
> * * * If it be conceded that the education of its prospective citizens is an essential governmental function of Georgia, as necessary to the preservation of the State as is the maintenance of its executive, legislative, and judicial branches, it does not follow that if the State elects to provide the funds for any of these purposes by conducting a business, the application of the avails in aid of necessary governmental functions withdraws the business from the field of federal taxation.
>
> Under the test laid down in *Helvering* v. *Gerhardt, ante,* p. 405, however essential a system

> of public education to the existence of the State, the conduct of exhibitions for admissions paid by the public is not such a function of state government as to be free from the burden of a non-discriminatory tax laid on all admissions to public exhibitions for which an admission fee is charged.

Reference to "the test laid down ir *Helvering* v. *Gerhardt*" was apparently to the fact that in that case the Court stated (304 U. S. at p. 419) that of the two guiding principles then definitely established by the decisions one—

> dependent upon the nature of the function being performed by the state or in its behalf, excludes from the immunity activities thought not to be essential to the preservation of state governments even though the tax be collected from the state treasury. * * *

This was evidently a statement of the general principle derived from *South Carolina* v. *United States,* 199 U. S. 437, and *Ohio* v. *Helvering,* 292 U. S. 360, in which the sale of liquor by a State was held not to be an activity immune from federal taxation, and from *Helvering* v. *Powers,* 293 U. S. 214, in which there was a similar holding as to the operation of a street railway by a State. In those cases, as in the *Regents* case, the activity involved consisted of a business which could be carried on by private individuals. In general, in each case immunity was denied because the State had engaged in business.

In the more recent case of *New York* v. *United*

States, 326 U. S. 572, on which petitioner relies (Br. 18), the State of New York claimed immunity from the federal tax on the sale of mineral water as applied to the business of selling mineral water conducted by the State. The claim of immunity was rejected and the tax sustained in two opinions—one written by Mr. Justice Frankfurter, who was joined by Mr. Justice Rutledge, and one written by Mr. Chief Justice Stone, who was joined by Mr. Justice Reed, Mr. Justice Murphy, and Mr. Justice Burton. Both opinions assumed the correctness of the decisions in the *Regents, South Carolina, Ohio,* and *Powers* cases (326 U. S. at pp. 574-575, 586, 589) and, as Mr. Justice Frankfurter stated before pointing to those decisions (p. 574), "On the basis of authority the case is quickly disposed of."

The opinions consist, for the most part, of delineations of the general test of immunity. Mr. Justice Frankfurter's opinion states that a State is not immune from a nondiscriminatory federal tax exacted from private persons upon the same subject matter. Under that test, according to the opinion, a State would be accorded immunity only for a discriminatory tax—a tax upon the State "as a State" (p. 582)—consisting of a tax imposed upon a state activity or state-owned property that partakes of uniqueness from the point of view of intergovernmental relations. Mr. Chief Justice Stone and those who joined with him were apparently not prepared to go so far. In their opinion there could be

a federal tax which is not discriminatory as to subject matter, being laid equally upon individuals and the State alike, which would nevertheless interfere unduly with the State's performance of its sovereign functions of Government merely because it is the State that is being taxed. As we interpret their opinion, it holds that immunity should be denied if to grant it would result in withdrawing taxable property or activities from the reach of federal taxation. In rejecting the State's claim of immunity, these Justices stated (pp. 588-590) that application of the federal tax on the sale of mineral water did not curtail the business of the State any more than it did the like business of citizens; that the withdrawal from the reach of such a nondiscriminatory tax is itself an impairment of the taxing power of the Federal Government; that the activity taxed is such that its taxation does not unduly impair the State's functions of government; and that (p. 589):

> The nature of the tax immunity requires that it be so construed as to allow to each government reasonable scope for its taxing power, *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 524. The national taxing power would be unduly curtailed if the State, by extending its activities, could withdraw from it subjects of taxation traditionally within it. *Helvering* v. *Powers, supra*, 225; *Ohio* v. *Helvering, supra*; *South Carolina* v. *United States, supra*, and see *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151, 173, explaining *South Carolina* v. *United States, supra*.

The opinions of both Mr. Justice Frankfurter and Mr. Chief Justice Stone abandoned the distinction between "governmental" and "proprietary" activities on which the previous decisions had rested to some extent. (Pp. 583, 586.) The decisive fact, for present purposes, is that under both opinions a State is subject to a nondiscriminatory federal tax on a business carried on by it which is not uniquely an activity of a State or one which has been traditionally outside the federal taxing power and thus, in the language of *Helvering* v. *Gerhardt*, 304 U. 405, 419, is not essential to the preservation of the State government.

By operating a bathing beach to which it charged admission, petitioner engaged in the business of furnishing bathing facilities for an admission fee. That business is of a type which has been, and even in the vicinity of petitioner's beach still is, carried on by private individuals.[13] It has not even been shown that petitioner charged a smaller admission fee than was charged at privately owned bathing beaches.[14] The maintenance of parks containing

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[13] It was stipulated that (R. 13):

> From South Chicago to Highland Park, Illinois there are 15 Lake Michigan bathing beaches operated by private persons for profit, of which 9 charge admissions and 6 are operated by hotels and clubs for the use of their patrons, residents and members without any express or specific admission charge.

[14] It was stipulated that petitioner charged a single daily admission of 50 cents for weekdays and $1 for Saturdays, Sundays and holidays. (R. 12.) Season tickets were also issued. In 1943 a single season ticket was $1.50 and a family ticket $4, and in 1946 the prices were $2 and $5, respectively. (Ex. 1 opposite R. 14.)

bathing beaches is no doubt properly within the authority of the State under the State Constitution, and it may be assumed that the maintenance of public parks is an essential governmental function. But the fact that this bathing beach was operated within a public park area does not make the business of operating the bathing beach immune from tax any more than was the sale of mineral water from a public park involved in the *New York* case. The operation of a bathing beach under circumstances and conditions whereby the State offers the facilities of the beach to the public for the payment of an admission fee in the same manner as any beach operated by private persons for profit is not an activity which is uniquely or traditionally a state function or is necessary to the preservation of the State. That the bathing beach was provided in the interests of the general health and welfare of the public may be assumed, but it does not follow that it is thereby rendered immune from federal taxation. The general health and welfare were also related to the State sale of liquor involved in the *South Carolina* and *Ohio* cases and to the State's conduct of athletic exhibitions involved in the *Regents* case, both of which were held to be activities not immune from federal tax. As the Court stated in the *Powers* case (p. 225):

> The fact that the State has power to undertake such enterprises, and that they are undertaken for what the State conceives to be the public benefit, does not establish immunity. * * *

Petitioner's argument is predicated upon the assumption that the activity taxed consists of the noncommercial activity of maintaining public parks.[15] (Br. 18-20.) Petitioner confuses the activity with the purpose to which the proceeds from it are devoted. Petitioner's activity and business was in furnishing bathing facilities for an admission fee—an activity which, unlike the furnishing of public schools for example, is not uniquely or traditionally a state function even when conducted within a public park. The nature of petitioner's activity and business was not changed by the fact that petitioner devoted the proceeds therefrom to the maintenance of the bathing beach. Nor does the purpose to which the proceeds were devoted have any bearing on the immunity question. This is illustrated by the *Regents* case, where the conduct of football games by a state instrumentality was held to be a non-immune "business" even though the conduct of the games was assumed to be an integral part of the State's program of public edu-

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[15] In the *New York* case, Mr. Chief Justice Stone's opinion stated (pp. 587-588):

> A State may, like a private individual, own real property and receive income. But in view of our former decisions we could hardly say that a general non-discriminatory real estate tax (apportioned), or an income tax laid upon citizens and States alike could be constitutionally applied to the State's capitol, its State-house, its public school houses, public parks, or its revenues from taxes or school lands, even though all real property and all income of the citizen is taxed. * * *

Such exclusions from federal tax would result because the property and income involved would be that uniquely and traditionally capable of being owned and earned by a State.

cation and even though the proceeds from the games were devoted to public education. Similarly, in the *New York* case the profits from the State's sale of mineral water were used to defray the expenses of a state health resort.

As already shown, if a State enters into an activity or business designed to obtain proceeds for the maintenance of a project or projects deemed to be for the public benefit or even for a traditionally governmental use, the State is not immune from federal tax so long as the business or activity is not itself the type of sovereign activity which requires preservation from interference by the Federal Government. The State cannot withdraw activities from the reach of the federal taxing power merely by engaging in such activities. That this is true even though no profit in the ordinary sense is intended is evident from the *Powers* case, where the operation of a street railway by a state instrumentality was not for profit but was nevertheless held not to be an immune activity. Moreover, the State actually realizes a profit from the conduct of any business or activity which produces funds that can be devoted to public benefit projects, since otherwise such projects would have to be financed with tax revenues.

IV

The amount of the tax due for the years 1942, 1943 and 1944 was properly collected from petitioner under Section 1718 of the Code as a penalty for failure to collect the tax from bathing beach patrons

As the person receiving amounts paid as admissions which were subject to tax under Section 1700(a)(1) of the Code, petitioner was required to collect the admission tax from its bathing beach patrons, keep the necessary records, file returns, and pay over the tax collected. Secs. 1715, 1716 and 1720, Internal Revenue Code, Appendix, *infra*, pp. 38-39, 40. For the years involved here—1942, 1943 and 1944— petitioner was given timely written notice to collect the tax from its beach patrons.[16] It did not do so. As a result, the amount of the tax for each of the three years was assessed against petitioner as a penalty pursuant to Section 1718 of the Code (Appendix, *infra*, pp. 39-40), which imposes a penalty in the amount of the tax for, among other things, willful failure to collect the tax.

Petitioner cannot object to payment of the penalties on the ground that they were or will be paid with tax revenues. The penalties for the years involved have been paid; this is a suit for refund. The record does not show with what funds petitioner paid the penalties; the admission receipts, rather than tax revenues, may have been used. It is

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[16] Written notice was received by petitioner on July 24, 1941, to collect an admission tax of 10 percent on all bathing beach tickets sold on and after July 25, 1941. (R. 13.)

in any event immaterial what funds have been or will be used. Petitioner's refusal to collect the admission tax from its beach patrons and use of tax revenues for payment of the penalties cannot change the admission tax on persons paying the admissions to a tax laid by the Federal Government upon the tax revenues of a State. Petitioner's argument on this branch of the case (Br. 28-29) raises only the question whether it, as a state instrumentality, is immune from the penalty under Section 1718 to which a private individual is subject.

The fact that petitioner is a state instrumentality does not relieve it from payment of the penalties imposed by Section 1718. As we have shown, collection of the tax was not restricted by the constitutional immunity of states and state instrumentalities from federal taxation. The imposition of the admission tax as applied to the admissions petitioner received from its bathing beach patrons was a valid exercise of the taxing power of the Federal Government. In order to attain a legitimate end—that is, to accomplish the full purpose of a granted authority—Congress has power to use all appropriate means plainly adapted to that end, unless inconsistent with other parts of the Constitution. *McCulloch* v. *Maryland*, 4 Wheat. 316, 420; *Case* v. *Bowles*, 327 U. S. 92, 102. The provisions for enforcement of the admission tax—including the requirement that the tax be collected by the person receiving the ad-

missions and the imposition of a penalty in the amount of the tax for willful failure to collect the tax—are means appropriately adapted to enforcement of the tax. See *Sunshine Coal Co.* v. *Adkins,* 310 U. S. 381, 393. Petitioner, in denying their applicability to it as a state instrumentality, is in effect claiming that it may defeat the tax by refusing to collect it. The basis of the claim is not clear, except that petitioner seems to argue that the applicability to it of the provisions for enforcement of the tax interferes with its sovereignty. Petitioner points to no constitutional provision to justify a conclusion that its sovereignty transcends the enforcement of a valid federal tax. The Tenth Amendment does not support such a conclusion. *Case* v. *Bowles, supra,* p. 102, and cases there cited. The laws enacted by Congress within a granted power are the supreme law of the land and "the sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution." *United States* v. *California,* 297 U. S. 175, 184. See also, *Case* v. *Bowles, supra; United States* v. *Darby,* 312 U. S. 100; *California* v. *United States,* 320 U. S. 577; *Oklahoma* v. *Atkinson Co.,* 313 U. S. 508, 534. Petitioner, as a state instrumentality, therefore has no more right to defeat the admission tax than does a private individual and, like a private individual, is subject to the prescribed penalty for willful failure

to collect the tax from its beach patrons. Cf. *Allen* v. *Regents*, 304 U. S. 439, 448, 456.[17]

Petitioner would not be exempt from payment of the penalties even if the penalties were regarded as an admission tax imposed directly upon the State. As we have previously shown (*supra*, pp. 23-31), petitioner's operation of the bathing beach was an activity or business which is not immune from federal taxation. Since the activity itself is not immune, no immunity would attach to an admission tax laid directly upon the State.

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[17] With respect to mere collection of the tax, the following statements in the *Regents* case, pp. 449-450, are also pertinent:

> For present purposes we assume the truth of the following propositions put forward by the respondent: * * * that the burden of collecting the tax is placed immediately on a state agency. * * * We have no occasion to pass upon their validity since, even if all are accepted, we think the tax was lawfully imposed and the respondent was obligated to collect, return and pay it to the United States.

The requirement by a State that the Federal Government collect a tax would not even be an unconstitutional burden. See *Colorado Bank* v. *Bedford*, 310 U. S. 41, 53.

CONCLUSION

The decision below is correct and should be affirmed.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.
THERON LAMAR CAUDLE,
Assistant Attorney General.
ELLIS N. SLACK,
LEE A. JACKSON,
HELEN GOODNER,
MELVA M. GRANEY,
Special Assistants to the Attorney General.

NOVEMBER, 1949.

Internal Revenue Code:

SEC. 1700. TAX.

There shall be levied, assessed, collected, and paid—

(a) *Single or Season Ticket; Subscription.*—

(1) *Rate.*—A tax of 1 cent for each 10 cents[18] or fraction thereof of the amount paid for admission to any place, including admission by season ticket or subscription; * * *

(2) *By whom paid.*—The tax imposed under paragraph (1) shall be paid by the person paying for such admission.

* * * * *

(26 U. S. C. 1946 ed., Sec. 1700.)

SEC. 1702. PRINTING OF PRICE ON TICKET.

The price (exclusive of the tax to be paid by the person paying for admission) at which every admission ticket or card is sold shall be conspicuously and indelibly printed, stamped, or written on the face or back of that part of the ticket which is to be taken up by the management of the theater, opera, or other place of amusement, together with the name of the vendor if sold other than at the ticket office of

[18] Section 302 of the Revenue Act of 1943, c. 63, 58 Stat. 21, changed the rate to 1 cent for each 5 cents or major fraction thereof.

the theater, opera, or other place of amusement.

(26 U. S. C. 1946 ed., Sec. 1702.)

SEC. 1703. PENALTIES.

(a) *Failure to Print Correct Price on Ticket.*—Whoever sells an admission ticket or card on which the name of the vendor and price is not printed, stamped, or written, as provided in section 1702, or at a price in excess of the price so printed, stamped, or written thereon, is guilty of a misdemeanor, and upon conviction thereof shall be fined not more than $100.

(26 U. S. C. 1946 ed., Sec. 1703.)

SEC. 1704. ADMISSION DEFINED.

The term "admission" as used in this chapter includes seats and tables, reserved or otherwise and other similar accommodations, and the charges made therefor.

(26 U. S. C. 1946 ed., Sec. 1704.)

SEC. 1715. PAYMENT OF TAX.

(a) *Collection by Recipient of Admissions, Dues, and Fees.*—Every person receiving any payments for admissions, dues, or fees, subject to the tax imposed by section 1700 or 1710 shall collect the amount thereof from the person making such payments. Every club or organization having life members shall collect from such members the amount of the tax imposed by section 1710.

(b) [As amended by Section 542 of the Revenue Act of 1941, c. 412, 55 Stat. 687] *Place of Payment.*—The taxes collected under subsection (a), and the taxes required to be paid under section 1700 (c), (d), or (e), shall be paid to the collector of the district in which the principal office or place of business is located.

(c) *Time of Payment.*—The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector at the time fixed for filing the return.

* * * * *

(26 U. S. C. 1946 ed., Sec. 1715.)

SEC. 1716. RETURNS.

(a) [As amended by Section 542 of the Revenue Act of 1941, *supra*] *Requirement.*—Every person required under subsection (a) of section 1715 to collect the taxes, or required under section 1700 (c), (d), or (e) to pay the taxes, imposed by this chapter shall make returns under oath, in duplicate, in such manner and containing such information as the Commissioner, with the approval of the Secretary, may, by regulation, prescribe.

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(26 U. S. C. 1946 ed., Sec. 1716.)

SEC. 1718. PENALTIES.

* * * * *

(c) Any person who willfully fails to pay, collect, or truthfully account for and pay over,

any tax imposed by this chapter, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty of the amount of the tax evaded, or not paid, collected, or accounted for and paid over, to be assessed and collected in the same manner as taxes are assessed and collected. No penalty shall be assessed under this subsection for any offense for which a penalty may be assessed under authority of section 3612.

* * * * *

(26 U. S. C. 1946 ed., Sec. 1718.)

SEC. 1720. RECORDS, STATEMENTS, AND RETURNS.

Every person liable to any tax imposed by this chapter, or for the collection thereof, shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe.

(26 U. S. C. 1946 ed., Sec. 1720.)

Treasury Regulations 43 (1941 ed.):

Sec. 101.2. *Meaning of "Admission."*—The tax is imposed on "the amount paid for *admission* to any place," and applies to the amount which *must be paid* in order to gain admission to a place. (See section 101.4.) The term "admission" means the right or privilege to enter into a place. The law specifically

provides that it shall also include "seats and tables, reserved or otherwise and other similar accommodations." A charge for their use in any place must, therefore, be treated as a taxable charge for admission. So an amount paid for the right to use a reserved seat in a theater or circus, a seat in a room or window to view a parade, or the like, is taxable. This is true whether the charge made for the use of the seat, table, or similar accommodation is combined with an admission charge proper to form a single charge, or is separate and distinct from an admission charge, or is itself the sole charge. The tax under section 1700 (a) as amended does not apply, however, to admissions to or charges for seats and tables in a cabaret, roof garden, or similar place which are subject to the provisions of section 1700 (e) of the Code as amended. (See sections 101.13 and 101.14.)

* * * * *

The amount paid for admission by season ticket is a fixed sum which entitles the holder to admission on definite dates to a series of scheduled attractions, or to admission at all times during the season, and the form of the ticket is not controlling.

* * * * *

An amount paid to become regularly entitled to the privileges of a club or other organization, as member or otherwise, is not an "amount paid for admission" even though one of the privileges be the right to enter a clubhouse,

club grounds, gymnasium, swimming pool, or the like. But where the chief or sole privilege of a so-called membership is a right of admission to certain particular performances or to some place on a definite number of occasions (as contrasted with a more or less unlimited right to enter a clubhouse or other place as many times as desired during a year or some other period), then the amount paid for such so-called membership is an "amount paid for admission" within the meaning of the Code. An entirely different tax is levied on amounts paid as initiation fees or as dues or membership fees to certain classes of clubs or organizations, and also upon life members of such clubs, by section 1710 of the Code. (See Subpart F.)

* * * * *

If a charge imposed on a person admitted to a place is designated as an admission it will be presumed that it is in fact an admission charge, even though it includes rental of property or services, such, for example, as a charge of 50 cents for admission to a swimming pool, including use of a suit. The tax will apply in such case unless it is clearly shown that the charge is for rental or services, and that persons who do not use the property or services offered (e.g., use of a swimming suit) are admitted free. On the other hand, the designation of a charge as a rental or service charge (e.g., a charge for use of a swimming suit) will not avoid the application of the tax if it in fact

represents a charge for admission, or includes the right to admission. If the same charge is made to the person using or furnishing his own property or equipment. as where property or equipment is furnished by the management, such charge is an amount paid for admission and subject to tax. If a lesser charge is made to persons who do not desire to use the property or services offered, the lesser charge represents the admission charge.

Sec. 101.3. *Meaning of the Term "Place."*— The tax under section 1700 (a) of the Code is on the amount paid for admission *to any place.* "Place" is a word of very broad meaning, and it is not defined or otherwise limited by the Code. But the basic idea it conveys is that of a definite inclosure or location. The phrase "to any place," therefore, does not narrow the meaning of the word "admission," except to the extent that it implies that the admission is to a definite inclosure or location. The inclosure or location may be on, above, or beneath the surface of the earth. Places of amusement obviously constitute the most important class of places admission to which is subject to this tax.

Sec. 101.4 *Basis, Rate, and Computation of tax.*— * * *

The tax applies whether any profit is contemplated or realized and whether the affair to which admission is charged is public or private.

* * * * * * *

The amount paid for admission to any place is the amount which must be paid to the person or persons controlling such admission in order to secure the privilege. * * *

Sec. 101.16 [as amended by T. D. 5170, 1942-2 Cum. Bull. 246] *Admissions by or for the Benefit of Federal, State, or Municipal Governments.*—The fact that the authority charging admissions or receiving the proceeds thereof is the United States or an agency thereof, or a State or Territory or political subdivision thereof, such as a county, city, town, or other municipality, does not make such admissions exempt. For exception see section 101.15 (b). The Code specifically provides that the taxes on admission shall be paid by the person paying for admission. It is not, therefore, a tax on the person or authority selling the admissions or receiving the proceeds thereof.

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